IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., MUSSA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 328 OF 2014

1. **JUMA MAGORI @ PATRICK .....1ST APPELLANT**
2. **BABU MATIKU @ ZAKARIA.....2ND APPELLANT**
3. **SOKORO MASHERE @ SHONGORI ..... 3RD APPELLANT**
4. **DEUSI ZAKARIA @ BUTIKU.....4TH APPELLANT**
5. **MIRUMBE ELIAS @ MWITA 5THAPPELLLANT**

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(De-Mello, J.)

dated the 15th day of September, 2014
in
Criminal Appeal No. 68 of 2014
.....

JUDGMENT OF THE COURT

1st & 5th June, 2015
RUTAKANGWA, J.A.:

Apart from griefs, fears and tears, Jackline Mayenga and her house girl, Agnes Emanuel, will never have any memories to cherish of 4th May, 2013. This is all because of the, admittedly, traumatizing brutalities they severally and jointly experienced in the early hours of that day. We are saying so consciously, not because we have a special predilection for evoking sympathy for the two unfortunate victims of the incident we are about to discuss. It is all because of the cruel force and unforgivable lack of respect for the dignity of a woman which

characterized the entire episode, the thought of which makes any sane person shudder, as the following harrowing account reveals.

At around 01.00 hrs. of that day both Jackline and Agnes were enjoying their slumber in two separate rooms of their residence at Bweri Bukoba street area of the municipality of Musoma when the serenity of their night was irremediably disturbed. They were rudely awakened from their slumber by a loud bang on the house's front door. Immediately thereafter two undisguised male persons burst into Jackline's bedroom wherein she had been sleeping with her five-year old daughter, Fide. As luck would have it for her, the bedroom and corridors were well illuminated by electricity light. She immediately recognized the intruders to be her neighbours, Mirumbe s/o Elias and Magesa s/o Majenjegere.

Mirumbe was armed with a knife, whereas Magesa had a 'Panga' (machete). The two stood close to her bed and cut the mosquito net. They ordered her not to raise any alarm. The intruders ordered Jackline to give them money and a mobile phone. When she refused, Mirumbe ordered Majenjegere to slaughter the girl Fide. With that threat, Jackline reached for her wallet, took out Tshs. 100,000/= as well as two cell phones which she surrendered to her night unwanted guests. After taking also her wrist watch, they ordered her to lead them to Agnes's bedroom, which she did. The lights in Agnes's room were, fortunately, also on.

Once in the room of Agnes, the two ladies were ordered to lie on a double-decker bed. Agnes was ordered to undress. Jackline was hesitant and she was hit by machete. As Agnes was ordered to lie on the floor, Mirumbe commanded Jackline to take him into another room. As Mirumbe was armed, she had to

comply. Once in the said room Jackline had to switch on the lights, and she was ordered to strip naked which she did and Mirumbe had carnal knowledge of her against her will. As Mirumbe was raping Jackline, Magesa was doing the same to Agnes in the other room. Thereafter, the two exchanged their unwilling partners, by Mirumbe raping Agnes and Magesa raping Jackline. But the ordeal did not end after the two had gratified their desires. Other bandits, who were unknown to the two victims, raped them in turns. After the ravishing exercise, the rapists left.

According to Jackline and Agnes, the ravishers did not leave empty handed. On top of the cash money and the victims' mobile phones, the bandits also made away with Jackline's T.V. set and Receiver, DVD deck and Panasonic radio. After ascertaining that the coast was clear, they raised an alarm, to which their neighbours responded, including one Mama Zai who happened to have been visiting one of their neighbours. Using Mama Zai's cellular phone, Jackline called her brother, Paschal Mgwesa to inform him what had befell them.

Paschal rushed to the scene of the crime after reporting the incident at Musoma Central Police Station. Jackline and Agnes were sent to Musoma Government hospital where they were attended by one Dr. Simon Hamili.

On the strength of the report of Jackline, and/or alleged confessions by the arrested suspects, Juma s/o Magori @ Patrick, Babu s/o Matiku @ Zakaria, Sokoro s/o Mashere @ Shongori, Deus Zakaria @ Butiku, Mirembe s/o Johanes, Mirume Elias and Msai s/o Elius @ Mwita were arrested and subsequently charged with one count of Armned robbery and two counts of gang rape, in the District Court of Musoma (the trial court). At the trial, Jackline, Agnes, Paschal and Dr. Simon testified as PW1, PW2, PW5 and PW6 respectively.

Each accused denied the charges. They claimed that they were, on divers dates, randomly arrested by the Musoma police, sent to the police station where they were interrogated in connection with the robbery and rapes committed at Jackline's house and on denying complicity, they were formally charged. The accused Mirumbe Elias specifically told the trial court that it was physically impossible for him to have committed the offences as on that day he was in Dar es Salaam, having left Musoma on 28/4/2013 and returned on 17/5/2013.

In his judgment, the learned trial Senior District Magistrate ruled that he was satisfied beyond any reasonable that PW1 Jackline and PW2 Agnes, who were found to be witnesses of truth, impeccably identified at the scene of the crime, all the accused persons, except Mirumbe Elias and Msai Elias @ Mwita. On the basis of the said visual identification evidence and the confessional statements recorded by PW3 No. 891 D.Sgt. Ally and PW4 No. E 206 D/Cpl. Deocles, he convicted them as charged and acquitted Mirumbe Yohanes and Msai Elias @ Mwita. The convicted accused were sentenced to 30 years imprisonment on each count, sentences being ordered to run concurrently. In addition, they were each ordered to suffer corporal punishment of 24 strokes of the cane on each count and to pay Tshs. 2,000,000/= as compensation.

The convicted persons were aggrieved by the conviction and sentences and preferred an appeal to the High Court. Surprisingly, the Republic did not appeal against the acquittals. We are saying so deliberately. This is because in acquitting the two accused the learned trial Senior District Magistrate did not consider the gravely incriminating evidence against them contained in the confessional statements (exhibits P1 to P5), which the respondent Republic is insisting were not only freely and voluntarily made but were also true. In fact,

the confessional statement of the acquitted Msai Elias Mwita was admitted in evidence as exh. P4 without any objection from him.

The appeal of the convicted accused persons was dismissed by the High Court in its entirety. After a painstaking study of the High Court judgment, we have learnt that the convictions of the appellant were confirmed on the strength of the visual identification evidence of PW1 Jackline and PW2 Agnes and the confessional statements. The defence of alibi of Mirembe Elias, was rejected in its totality because the said appellant had not given notice in terms of s. 194 of the Criminal Procedure Act, Cap. 20, R.E. 2002 (the Act). Not satisfied with the first appellate court's judgment, the appellants have preferred this appeal, through M/s Kabonde and Magoiga Law Firm (Advocates).

Counsel for the appellants fronted five (5) grounds of appeal in their bid to fault the judgment of the High Court and establish the innocence of the appellants. Briefly, those grounds are as follows:-

(a) The learned High Court judge erred in law in relying on the confessional statements which were recorded outside the prescribed period.

(b) The confessional statements were irregularly admitted in evidence.

(c) The learned first appellate judge erred in law in failing to hold that the notice of alibi given by the 5th appellant was proper and failure to consider it occasioned a failure of justice.

(d) The learned first appellate judge erred in law in relying on dock identification evidence.

(e) The case for the prosecution was not proved beyond reasonable doubt.

To prosecute the appeal before us, was Mr. Stephen Magoiga, learned advocate. For the respondent Republic, Ms. Ajuaye Bilishanga, learned Senior State Attorney, appeared to resist the appeal.

In disposing of this appeal, we have found it apt to begin with the complaint regarding dock identification, as this is the simplest one. Mr. Magoiga strenuously argued that it was wrong for the two courts below to rely on dock identification evidence in convicting the appellants, because there was no identification parade held. Ms. Bilishanga urged us to dismiss this ground of appeal as it is predicated on a total misconception of the law, as the appellants were well known to the witnesses. We are in agreement with Ms. Bilishanga.

In law, dock identification strictly means the identification of a suspect/accused who was previously unknown to the witness in the court while giving evidence. Going by the evidence on record, the appellants were not strangers to PW1 Jackline and PW2 Agness. They were known to each other prior to 4th May, 2013. Each appellant admitted this fact in his evidence asserting that the two witnesses were close neighbours and knew each other. We accordingly find no merit in this ground of appeal and dismiss it.

Regarding the issue of the defence of alibi, we have also found it totally wanting in merit. Submitting in support of this ground of complaint, Mr. Magoiga frantically argued that the 5th appellant gave a proper notice in terms of s. 194 of Act. In support of his argument, he referred us to page 21 of the record of appeal, where at the stage of the preliminary hearing he had told the trial court that he would "call about (2) two witnesses" whom he named and had "Bus

tickets dated 28th/04/2013 and 17th/06/2013." Ms. Bilishanga was of the firm view that this information could not constitute a notice envisaged by s. 194 of the Act. We are in agreement with her.

We are in agreement with Ms. Bilishanga because the fact that the appellant intended to call witnesses did not necessarily mean that the said witnesses were going to testify that the appellant was not at Bweri at the time the offences were being committed. The same applies to the bus tickets. As the offences were committed on 4th May, 2013, the bus ticket of 28/4/2013 of an undisclosed transporter and to an unknown destination could not help the prosecution and/or the court know in advance where the appellant was on 4th May, 2013.

To bolster his submission on the issue, Mr. Magoiga, referred us to this Court's decision on the issue in the case of **D.P.P. v. Nyangeta Somba and 2 Others** [1993] T.L.R 69, at page 71. We have to admit that we have found this case of no assistance to Mr. Magoiga. On the contrary, it fortifies the position of Ms. Bilishanga, as the so called notice of alibi lacks the necessary particulars. The Court, in that case, held thus:-

> *"No form of notice envisaged by this provision has been prescribed, but the view we take is that the notice must furnish sufficient particulars of the alibi so as to enable the prosecution to verify the truth of those particulars and if necessary assemble evidence in rebuttal, and that the notice should be given before the main hearing."*

In his defence, the 5th appellant told the trial court that he was not in Musoma on the day of the robbery and gang rapes. He had left on April, 2013

with Mohamed Trans Bus and returned to Musoma on 17th June, 2013, only to be arrested the following day at 02.00 hrs. He never tendered in evidence the bus tickets for both dates. Responding to the public prosecutor's question while under cross examination, he said:-

> *"I travelled to DSM and during the commission of these offences on 04th/05/2013, I was away in DSM, and* ***I don't have bus tickets; I pray the court to believe me."***

The nagging question to which Mr. Magoiga never addressed his mind is: if this appellant seriously wanted the court to believe him on his defence of alibi, why did he not tender those bus tickets in evidence? The clear answer to this pertinent question was provided by his witness DW7 Sanga Elias @ Mwita. While under cross-examination, this defence of alibi witness tellingly belied himself and the 5th appellant, when he said:-

> *"The bus tickets confirm about the journey who has travelled, but without having it, is clear that the 6th accused did not travel to anywhere ... I have no bus tickets to confirm the journey."*

From these pieces of evidence, it is clear that the journey to Dar es Salaam was a figment of the 5th appellant's own imagination. It is our firm finding, therefore, that the 5th appellant was at Bweri on 4th May, 2013, and the courts below rightly rejected his concocted defence of alibi.

Regarding the issue of the confessional statements, after studying the entire evidence on record, we have found ourselves constrained to hold that despite Ms. Bilishanga's protestations to the contrary, they were wrongly relied upon by two courts below to convict the appellants. Nevertheless our, stance on this issue is not predicated on the reasons advanced by Mr. Magoiga. Our formidable reason is one: they could not be true. We shall elaborate.

We understand that there is no better witness for the prosecution than an accused who confesses to the crime(s) preferred against him. Such a confession may either be oral or in writing. Written confessions are more often than not found in cautioned statements to the police under sections 57 and/or 58 of the Act or extra judicial statements made to the Justices of Peace.

We take it to be trite law that for a confessional statement to be proof of commission of an offence by its maker, it must not only have been made freely and voluntarily but must also be nothing but true. Assuming without deciding here that the impugned confessional statements were freely and voluntarily made, though not within the prescribed periods, we are a shade unsure on whether they were true. This is all because they not only contradict each other, but they contradict the evidence of PW1 Jackline and PW2 Agness. For this reason we have no lurking doubt in our minds in saying that both the two courts below and the counsel for the respondent relied on them without scrutinizing them. A few examples will help vindicate us.

There is no dispute on the fact that the bandits gained entry into PW1 Jackline's house by breaking into the building. The contradictions center on how the breaking took place. In the alleged statement of the first appellant, it is shown that the bandits gained ingress not violently but by Mirumbe Elias (5th appellant) using his master key to open all the doors of the house. According to the statement attributed to Sokoro Mashere (3rd appellant), this was done after the 5th appellant in collaboration with the 1st appellant (Juma Magori) hitting the front door with a very big stone. On his part, the 5th appellant stated that on arriving at the house of PW1 Jackline, all the more than seven bandits collaborated in breaking the door using a big stone and a master key owned and always kept by the fugitive Magesa s/o Nyahura @ Majenjegere. But the 2nd

appellant (Babu) had a different story. The door was forced open by the 5th appellant, Mirumbe Johanes and Wambura Master, by hitting it with a bit stone popularly known as Fatuma. The story attributed to Msai Elia Mwita, who was acquitted, the door was smashed open using a big stone, a piece of iron and a master key. These are all definitely sheer lies.

Regarding the bandits who entered the house, those caution statements give different versions. According to the 1st appellant, it was only the 5th appellant and Magesa Majenjegere who did so, and the rest remained outside. The statement of the 2nd appellant is to the effect that it was the 1st and 5th appellants as well as Mirumbe Johanes and Wambura Master. The account of the 3rd appellant was that only the 1st and 5th appellants entered the house and all the other bandits remained outside. As far as the alleged statement of the 5th appellant goes, only four bandits entered the house. These were himself, the 1st appellant, Mirumbe Yohanes and Wambura Marwa. In addition, contrary to the evidence of PW1 Jackline and PW2 Agnes, the statement shows that Magesa raped Jackline and the 5th appellant raped Agnes. In view of these patent and unexplained fundamental contradictions it cannot be held without demur that the so-called confessional statements were nothing but true.

Since it is now very clear that these so-called confessional statements are riddled with palpable falsehoods, we shall accord no weight at all to them. A citizen's liberty in a free and democratic society like ours must never be curtailed and/or sacrificed at the altar of expediency and over-zealousness. If these so-called confessions were nothing but true the 7th accused Msai Elias Mwita whose confessional statement was received in evidence without any objection from him as exh. P4, and Mirumbe Yohanes, would not have been acquitted. If the prosecution strongly believed that their acquittal was against a massive weight of cogent evidence against them, it would not have failed to challenge their

acquittal, for the confessions could not have been true for the appellants and untrue when it came to Mirumbe Yohanes and Msai Elias. We think this discussion disposes of the two complaints relating to the cautioned statements, although through a different avenue.

The remaining ground of complaint is that the prosecution did not prove its case against the appellant "to the standard required in criminal cases." On this, we are, to a limited extent, in agreement with Mr. Magoiga, as Ms. Bilishanga was. We shall elaborate on this shortly.

We shall begin our canvassing of this issue pointing out that the fact that an armed robbery was committed at the home of PW1 Jackline in the early hours of 4th May, 2013 was not disputed at all. Like the two courts below, we hold that on the unchallenged evidence of PW1 Jackline and PW2 Agnes, the offence of armed robbery was proved beyond reasonable doubt. The contest between the appellants and respondent Republic is on the identity of the robbers.

Regarding the gang rapes, Mr. Magoiga is of the view that the evidence in support of this is wanting in cogency because the doctor who examined the victims did not make a specific conclusion that the two complainants were raped. We think this complaint should not detain us at all. It is settled law in rape cases, that the best witness is the prosecutrix herself see for example:-

(a) ***Daniel Nguru and Others v. .R.,*** *Criminal No. 178 of 2004,*

(b) ***Rashid A. Mtungwa v. R.,*** *Criminal Appeal No. 91 of 2011,*

(c) ***Patrick Lazaro & Another v. R.,*** *Criminal Appeal No. 229 of 2014 (all unreported).*

In the case under scrutiny, both PW1 Jackline and PW2 Agnes, gave a chilling account on how they were raped in turns by Mirumbe Elias (5th appellant), Magesa Majenjegere and a few others they could not identify. They went on to testify that each one of them felt a lot of pains in their female organs during the commission of the heinous and barbaric offences. The trial court believed them as well as the High Court on a first appeal. We have no cause, leave alone a good one, to differ with these concurrent findings of fact. That said, we find ourselves constrained to hold that the two counts of gang rape were proved to the required standard. The issue here again, is the identity of the rapists. This takes us to the issue of identification evidence.

Having discredited the confessional statements, the prosecution case now stands or falls on the basis of visual identification evidence of PW1 Jackline and PW2 Agnes. Did their evidence unmistakably place the appellants, who are denying the charges, at the scene of the crime?

Settled law is to the effect that visual identification evidence is of the weakest character and courts should always approach it with great caution before grounding a conviction on it: See, for instance, **Waziri Amani v. R.,** [1980] T.L.R 250 **Mateso v. R.,** [2013] IE.A 187, **Issa s/o Mgara @Shuka v. R.,** Criminal Appeal No. 37 of 2005 (unreported).

It is equally trite law that in a situation where there was an invasion by a mob of armed bandits under unfavorable circumstances, "positive evidence of the identification of the attackers" and "on all aids to mistaken identification" is necessary: see, **Ayubu s/o Zahoro v. R.,** Criminal Appeal No 177 of 2004,

Said Chally Scania v. R., Criminal Appeal No. 69 of 2005 (both unreported), etc. Although in this case, there was an attack by armed bandits and at night, like the two courts below, after an objective evaluation of the evidence, we are satisfied that the two identifying witnesses made no mistake in their identification of the 5th appellant Mirumbe and Magesa Majenjegere. The house wherein the crimes were committed was well lit; the two bandits were well known to the witnesses because they are close neighbours (a fact admitted by the appellants); they spent of lot time together and were at the closest proximity with each other when the sexual intercourses were taking place, etc.

We are also aware that "recognition evidence could not be trouble free", as was stated by Lord Lane in **R. v. Bently** [1991] Criminal Law Rex. 620 (C.A.), as even "mistakes in recognition of close relatives and friends are often made" (**Issa Mgara @ Shuka** (supra)). But in this particular case, truthful the evidence of PW1 Jackline and PW2 Agnes absolutely rules out this possibility, and they immediately named some of the bandits to the people who responded to the alarm and the police.

Of course, Mr. Magoiga has taken issue with the failure of the prosecution to call Mama Zai as a witness. To this grievance we shall respond by resorting to Lord Thankerton in **Adel Mohamed & Dabbah v. A.G. for Palestine** [1944] A.C. 156. He said:-

> *"It must be taken as established law that the prosecution enjoys discretion whether to call or tender any witness they require to attend, but that discretion is not unfettered. The first principle which limits that discretion is that it must be exercised to promote a fair trial ..."*

And in **Speratus Theonest @ Alex v. R.,** Criminal Appeal No. 135 of 2003 (unreported), we held that the prosecution does not have "the obligation to produce witnesses irrespective of the consideration of number and reliability", for "the evidence has to be weighed and not counted."

In this case, therefore, the prosecution did not need to call the entire street residents or only Mama Zai to testify on the simple and undisputed fact that the two victims named the culprits at the earliest opportunity. What Mama Zai could have testified on, was achieved through PW5 Paschal whose credibility was not challenged at all. After all, such a requirement propagated by Mr. Magoiga is circumscribed by the condition that the witness(s) is or " are within reach", before an inference adverse to the prosecution can be drawn: see, **Aziz Abdalla v. R.,** [1991] TLR 71 and **Lubeleje Mavina and Another v. R.,** Criminal Appeal No. 172 of 2006 (unreported). There is no indication here from the defence that Mama Zai, who was in transit when the offences were committed, was "within reach" when the trial commended.

In view of these observations and findings, we are of the settled mind that the truthful evidence of PW1 Jackline and PW2 Agnes proved beyond reasonable doubt not only the charge of armed robbery but also the two counts of gang rape. As to the identity of the armed robbers and gang rapists, on the basis of the very cogent evidence of PW1 Jackline and PW2 Agnes, we share the same certitude with the two courts below that the 5th appellant Mirumbe Elias and Magesa Manjenjegere were among the gangsters. We accordingly uphold the convictions of the 5th appellant Mirumbe Elias and the thirty years term imposed on him in the first count.

As for the sentences imposed on the second and third counts, both Mr. Magoiga and Ms. Bilishanga, were in agreement that the thirty-year sentences were illegal, as the minimum sentence for gang rape is life imprisonment. We agree. As there was no appeal by the D.P.P. against these illegal sentences, we have to invoke section 4 (2) of the Appellate Jurisdiction Act. In the exercise of our revisional jurisdiction, we quash and set aside the illegal sentences of thirty years imprisonment and substitute thereof the lawful sentence of life imprisonment in the second and third counts. All sentences to run concurrently.

Regarding the other four (4) appellants, we have found the evidence against them very scanty. None of the two identifying witnesses mentioned them specifically in their evidence in chief, and as a result all, except the 1st appellant and the 5th appellant, never cross-examined PW2 Agnes. PW2 Agnes, in relation to the 1st appellant had this to say while under cross-examination from him:-

"I know you, you are among the bandits who invaded us."

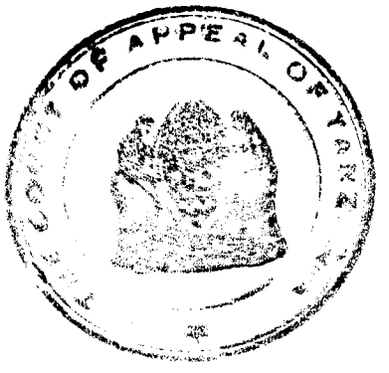
On her part, PW1 Jackline only asserted thus in her evidence in chief:-

"I saw the rest of the accused's I mentioned above."

It is worth noting that she had up to that juncture specifically mentioned Magesa Majenjegere and Mirumbe Elias in connection with the robbery and gang rapes. She made similar assertions while under cross-examination. This being a criminal case, we have found such evidence to be totally unsatisfactory. It would be a risk taking, our part to ground a conviction on such uncorroborated fleeting references. We are accordingly forced to give them the benefit of doubt and allow their appeals against convictions and sentences, which are hereby quashed

and set aside. The 1st, 2nd, 3rd and 4th appellants should be released forthwith from prison unless they are otherwise lawfully held.

DATED at MWANZA this 5th day of June, 2015.



E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL