IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MASSATI, J.A. ORIYO, J.A. And MUSSA,J.A.)

CRIMINAL APPEAL NO. 419 OF 2013

NEBSON TETE..APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

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

(Karua, J.)

dated the 20th day of May, 2013

in

Criminal Appeal No. 17 of 2012

JUDGMENT OF THE COURT

17th & 27th August, 2015

ORIYO, J.A.:

In the District Court of Mbozi sitting at Vwawa, the appellant was charged of Rape, contrary to section 130(1) and 131 of the Penal Code, Cap 16, R.E. 2002. At the end of a full trial he was convicted as charged and sentenced to thirty (30) years imprisonment. Aggrieved by the conviction and sentence, he preferred an appeal to the High Court of

Tanzania at Mbeya. The High Court dismissed the appeal, hence this second appeal.

The evidence in brief upon which the conviction of the appellant was grounded was as follows. It was alleged at the trial court that on the date of the incident at around 20.00hrs at Hanseketwa Village, Mbozi District, Mbeya Region, the appellant had carnal knowledge of PW2, a woman aged sixty two (62) years old, without her consent. PW2 recognized the appellant with the aid of moonlight as he was doing casual labour in the neighbourhood. PW2 raised an alarm unsuccessfully as the appellant held her neck tightly and raped her. When done, the appellant let PW2 go and he disappeared from the scene after satisfying his lust.

As luck had it, PW1, a resident of the same area, was on her way home when she met the appellant running. Like PW2, she identified the appellant with the aid of moonlight. Shortly thereafter, she found PW2 lying down on the ground. The latter, informed PW1 that she had been raped by the appellant. PW1 assisted PW2 to leave the scene and took her to PW3, a ten cell leader in the area. PW2 narrated the ordeal to PW3 and named the appellant as the ravisher; which led to his arrest on the same

night. The appellant admitted the offence. He was then taken to the Village Executive Officer and eventually to Vwawa Police Station.

Upon his arraignment in the trial court, the appellant vehemently denied having committed the offence as alleged.

The appellant who appeared before us at the hearing in person, without legal representation had filed a memorandum of appeal with six (6) grounds of complaints. Ms Catherine Gwaltu, learned Senior State Attorney represented the respondent Republic. She argued in support of the appeal on two grounds; one, on inadequate, insufficient evidence of identification and two, the absence of proof of penetration. The learned Senior State Attorney submitted that PW1 and PW2 were aided by moonlight in identifying the appellant. However, she stated that such evidence fell short of the conditions for proper identification set out in **Waziri Amani Vs Republic** [1980] TLR 250, because PW1 and PW2 did not lead any evidence on the intensity of the moonlight at the material time. In support of the position she had taken, the learned Senior State Attorney referred us to the decision of the Court in **Salum Mussa Vs Republic,** Criminal Appeal No. 1 of 2011 (unreported).

Regarding the absence of any evidence on proof of penetration as an essential element to prove rape, in terms of section 130(4) of the Penal Code, the learned Senior State Attorney referred to **Bakari Rashid Vs Republic,** Criminal Appeal No 308 of 2010,(unreported). She submitted that since penetration had not been proved, then, the offence of rape has not been proved to the required standard.

We are entirely in agreement with the learned Senior State Attorney that the main complaint here is the question of identification.

Admittedly, the incident took place in the village at night time when, under normal circumstances darkness had set in. It is settled law that courts should closely examine the circumstances in which an identification of any witness is made. According to PW1 and PW2 whose testimonies were accepted and relied upon to convict, there was moonlight on that night, which aided them in identifying the appellant.

Courts have consistently held that where evidence of visual identification is disputed and/or is otherwise problematic, courts should warn themselves of the need for caution before convicting an accused solely on the basis of the correctness of such identification. In the course

of time, courts have prescribed some salient common factors to be considered. These factors include: how long did the witness have the accused under observation, at what distance; if at night time, what was the source and intensity of the light, whether the observation was impeded in anyway; whether the witness had ever seen the accused before and if yes, how often; whether the witness named or described the accused to the next person he saw and whether those other persons gave evidence to confirm it; see **Waziri Amani Vs Republic**, (*supra*) **Raymond Francis Vs Republic** [1994]TLR 100, **Augusto Mahiyo Vs Republic**, [1993] TLR 117, **Shamir John Vs Republic** Criminal Appeal No. 166 of 2004**, Dadu Sumano @Kilagala Vs Republic** Criminal Appeal No. 222 of 2013(both unreported).

However, even with constant observation of the factors enumerated above, it cannot be said to have conclusively eliminated all possibilities of mistaken identities.

The situation is different where the evidence of identification is by recognition; which has been held by courts to be more reliable than an identification of a stranger. But caution should as well be observed in that

when a witness is purporting to have recognized someone known from before, mistakes cannot be ruled out; see **Issa s/o Ngara @Shuka Vs Republic** Criminal Appeal No 37/2005; **Magwisha Mzee Shija Paulo Vs Republic**, Criminal Appeal No 465 and 467 of 2007, (both unreported).

In the instant case, both PW1 and PW2 testified to have identified the appellant by recognition as he lived and worked as a casual labourer in the same village of Hanseketwa, Mbozi District where PW1 and PW3 were also residents. This piece of evidence was not challenged by the appellant. Further, there was the evidence of unimpeded observation by PW2 which was impeccable, due to the close proximity she had with the appellant during the sexual encounter.

The courts below were impressed and believed the evidence of recognition by PW1, PW2 and PW3 as nothing but the whole truth.

In his defence, the appellant only explained what happened on the material day from the time of his arrest. He denied to have raped PW2.

After an objective evaluation of the evidence carried out by the trial court, we are satisfied that the trial District Court rightly relied on the

evidence of identification by recognition and in particular, the close proximity between PW2 and the appellant during rape; in addition to the moonlight. The fact that PW1 and PW2 immediately reported the incident and named the appellant immediately to local authorities, facilitated the arrest of the appellant in the same night.

Regarding the absence of evidence of penetration, as alleged by the learned Senior State Attorney, the relevant law is quite explicit on this.

Section 130(4) of the Penal Code, states:

> " *(4) For the purposes of proving the offence of rape-*
>
> *(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offence;*

In this connection beside the direct evidence by PW2, there was the evidence of PW1 who found PW2 still crying, lying on the ground where the rape had occurred. PW1 was on her way home when she met the appellant on the road putting on his trousers hurriedly while he was at the same time running. This behavior on the part of the appellant was not normal for an adult. And only a few metres thereafter, PW1 found PW2

thereafter lying down crying, only to inform PW1 that she had been raped by the appellant.

The fact that PW2 named the appellant immediately to PW1 who reported the incident to PW3 leading to the arrest of the appellant, lent credence to the prosecution case that indeed it was the appellant who raped PW2; See **Marwa Wangiti Boniface Matiku Mgendi Vs Republic**, Criminal Appeal No. 6 of 1995 (unreported), where the Court made the following observation:-

> *"The ability to name a suspect at the earliest opportunity is an all important assurance of his reliability in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry"* See also

Thomas Mlambivu Vs Republic, Criminal Appeal No. 134 of 2009, (unreported).

In **Hassan Bakari @ Mamajicho Vs Republic,** Criminal Appeal No. 103 of 2012, the Court expounded on the meaning of **sexual intercourse** to mean the penetration of the male organ into the female organ. In this case, part of the evidence of PW2 as captured was as follows:-

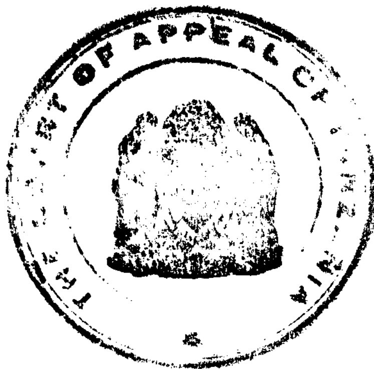
"He raped me. Soon after he finished, he ran away. He left me lying down."

This piece of evidence was sufficient to prove that there was penetration and/or forceful sexual intercourse, in terms of section 130 (4) (a) (*Supra*). The penetration of the male organ into the female organ, is an essential element, however slight, it may be; see **Tumaini Mtayomba Vs Republic,** Criminal Appeal No. 217 of 2012, **Minani Selestini Vs Republic,** Criminal appeal No. 66 of 2013 (both unreported). And in view of the clear language of the law in section 130(4) (a), the slightest penetration is sufficient to prove the offence of rape; See **Hassani s/o Amiri Vs Republic,** Criminal Appeal No. 304 of 2010, **Daniel Nguru and Others Vs Republic,** Criminal Appeal No. 178 of 2004 (all unreported).

In **Hassan Bakari @ Mama Jicho Vs Republic** the Court explained away the reasons why witnesses or even the courts for that matter, would avoid using direct words like **penis, vagina** and the like, due to cultural background, upbringing, religious beliefs, the type of evidence, age, etc,. Such restrictions are understandable as long as the intended party grasps the meaning of what is meant.

Having sufficiently explained away the concerns raised by the learned Senior State Attorney on the inadequacy of the evidence of identification and penetration, we find the appeal devoid of merit and it is accordingly dismissed.

DATED at **MBEYA** this 26th day of August, 2015.



S.A.MASSATI
JUSTICE OF APPEAL

K.K.ORIYO
JUSTICE OF APPEAL

K.M.MUSSA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA

SENIOR DEPUTY REGISTRAR

COURT OF APPEAL