IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: LUANDA, J.A., JUMA, J.A. And MUGASHA, J.A)

CRIMINAL APPEAL NO. 103 OF 2015

ALLY BAKARI DANGA ..... APPELLANT

VERSUS

THE REPUBLIC. .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tanga)

(Msuya J.)

dated 5th day of May 2014

in

Criminal Appeal No. 42 of 2012

.....

JUDGMENT OF THE COURT

11th & 14th August, 2015

JUMA, J.A.:

The appellant ALLY BAKARI DANGA was convicted by the District Court of Korogwe, at Korogwe for the offence of rape under section 130 (1) and 131 (1) of the Penal Code, Cap 16 and sentenced to thirty (30) years imprisonment and twelve strokes of the cane. His first appeal against

his conviction and subsequent sentence was dismissed by Msuya, J. for want of merit.

From the evidence on record it is undisputed that the complainant, Zahirina d/o Alfani (PW2) and the appellant lived in the same house. On 1/1/2012 PW1 at around 2 a.m. PW2 was asleep in her room when she felt someone seizing her throat and blocked her mouth. As she weakened, the appellant had sexual intercourse with her. After gratifying himself, the appellant left but not before asking PW2 to rise up from her bed and shut the door. Although the room was in darkness, PW2 claims that she used a torch and managed to identify the appellant. Early in the morning at around 5 a.m., PW2 went to inform Bernard Mbilimbi (PW1) about her ordeal of the previous night. PW1 went to check the complainant's room and found the door had indeed been broken. The complainant showed PW1 where the appellant's room was. Upon entry, PW1 checked the appellant's private parts and saw sperms smeared on the appellant's penis.

The appellant was taken to Mazinde Police Station where E6967 detective corporal Salum (PW4) was put in charge of the investigations. The station had no Police Forms (PF3) to enable the complainant to be referred to hospital for medical examination. The complainant was asked to

travel to Mombo Police Station to obtain the PF3. It took another five days before the complainant was examined by a medical officer. Dr. Asenga (PW3) testified that on 6/1/2012 he was presented with a victim of alleged incident of rape. PW3 described this victim as an old woman who upon his clinical examination: *"I noted that in her vagina she had no sign of rape. That was not surprise to have missed those signs due to passage of time from when the act was alleged to had been done."*

In his defence, the appellant denied the allegation of rape which the prosecution witnesses had leveled against him.

In his second appeal in this Court the appellant preferred four (4) grounds. First, the appellant faulted the first appellate judge for sustaining the conviction of the appellant without looking at the five days' delay before the victim (PW2) went to hospital for medical examination. Second, the appellant faulted the first appellate judge for concluding that the complainant was raped contrary to the evidence of the medical officer (PW3) whose medical examination found no sign of rape. In his third and fourth grounds the appellant faults that the first appellate Judge for holding that the appellant had confessed at the police station whereas no such cautioned statement was tendered.

At the hearing of his appeal before us, the appellant who was unrepresented, preferred the learned State Attorney to first respond to his four grounds of appeal and he would submit thereafter in a rejoinder. Ms. Rebecca Msalangi and Ms. Maria Clara Mtengule learned State Attorneys advocated for the respondent/Republic. From the outset, Ms. Msalangi pronounced her position that she did not support the appeal because she believed that the prosecution had as against the appellant, proved its case beyond reasonable doubt through the evidence of PW2 who was the victim of the sexual offence. According to the learned State Attorney, the victim of the sexual offence gave a detailed account on how she was able to identify the appellant.

We think Ms. Msalangi is with due respect correct that the four grounds of appeal do not form the basis of the appellant's conviction because the conviction of the appellant was based on the evidence of the victim of the sexual offence. There is no doubt that the evidence of the victim of sexual offence alone can in circumstances specified under section 127 (7) of the Evidence Act, Cap. 6 can stand alone to sustain a conviction. This Court has on several occasions reiterated that from the legal position stated under section 127 (7), the proof of rape comes from the prosecutrix

herself: see **Anania Bukuku vs. R.**, Criminal Appeal No. 65 of 2012 citing **Godi Kasenegala v Republic** Criminal Appeal No. 10 of 2008 (both unreported). Section 127 (7) states:

> *127 (7) 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 of 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."*** [Emphasis added].

For purposes of the instant appeal, we will ask ourselves whether there are circumstances on the record which call for our reassessment of

the credibility of the evidence of the victim of sexual offence (PW2) upon whose evidence the conviction was based. The trial Principal District Magistrate regarded the victim as a witness of truth:

> *"...I believe that the complainant (PW2) was carnally known because of the evidence of PW2 who in her evidence said that she was carnally known on 1/1/2012 and because she is a grown up and there is no evidence that PW2 is insane, therefore I have believed her evidence that she was sexually assaulted....*
>
> *...I will hold that the rapist was the accused on the following reasons. The accused was not a stranger to PW2 for the accused and PW2 are residents in one house and secondly PW2 was able to see accused well by the help of torch light and he was seen at close distance that is in room of PW2..."*

On her part, the first appellate Judge agreed with the trial court by pointing out that the evidence on record clearly indicates that the appellant

was not mistakenly identified because the light sourced from the torch, assisted the victim to identify the appellant as her assailant.

With regard to the identification, the incident of rape took place at 2 a.m. in a room which was dark. Much as the appellant may not have been a stranger to PW2 on account of their both living in one house but different rooms, we are not so sure about the visual identification evidence of PW2 with the help of torch light. In her evidence in chief, PW2 stated:

> *"...On 1.1.2012 ... at 2:00 a.m. I was asleep in my room.* ***I felt the accused seize me by throat and blocked my mouth. I became weak and accused had sexual intercourse with me*** *and on finishing his act he told me to wake up and shut my door.*
>
> ***There was darkness in the room. I shone my torch on him and I saw him well.*** *I then told him thank you."* [Emphasis added].

It is not clear to us how the complainant could have felt that it was the appellant who crept into her bed and gripped he neck and blocked her mouth when she had not even shone her torch. It is not clear if she managed to shine her torch while the appellant was having sexual intercourse with her or she directed the torch light at the appellant when he was leaving the room after having sexual intercourse with her. Apart failing to address the question of the time when the torch was lighted, neither the trial court nor the first appellate court addressed the question of the intensity of the light from the torch.

Since its decision in **Waziri Amani v. R.** (1980) T.L.R. 250, the Court has always warned that evidence of visual identification especially at night, requires great caution on account of its potential unreliability. The two courts below do not seem to have heeded this warning in so far as intensity of the light from the torch and at what moment, either during or after the sexual assault, when it facilitated the visual identification of the appellant. Although the victim was without doubt telling the truth that she was raped, we cannot from her evidence conclude that she positively identified the appellant as that person who raped her.

In the event, we allow the appeal, quash the conviction and set aside the sentence. The appellant is to be set free forthwith unless otherwise lawfully held.

DATED at **TANGA** this 13th day of August, 2015.

B. M. LUANDA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL