IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

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

CRIMINAL APPEAL NO. 229 OF 2014

PATRICK LAZARO

NESTORY BERNADO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction and sentence of the High Court of Tanzania at Bukoba)

(Lyimo, J.)

dated the 24th day of July, 2014
in
Criminal Appeal No. 29 of 2007
.....

JUDGEMENT OF THE COURT

19th & 24th February, 2015

JUMA, J.A.:

Before the District Court of Ngara at Ngara, the two appellants Patrick Lazaro and Nestory Bernado (2nd and 1st accused respectively), were jointly and together charged with the offence of

gang rape contrary to section 131A (1) and (2) of the Penal Code, Cap. 16. The particulars of the offence alleged that:

> *"...are jointly and together charged on 20th day of September, 2006 at 20.00 hours at Kanyinya Village, within Ngara District in Kagera Region, did unlawfully have carnal knowledge of one Janetha w/o Baragondoza a woman of 39 years without her consent."*

The trial District Court Magistrate (G.G. Biyereza -DM) concluded that the prosecution evidence had established that it was the two appellants, another Andrea, and not any other person, who jointly had carnal knowledge of the complainant without her consent. He convicted them imposed on each, a sentence of life imprisonment, and to suffer twelve strokes of the cane as corporal punishment. The trial magistrate in addition ordered each of the two appellants to pay the complainant Tshs. 150,000/= as compensation.

Their first appeal to the High Court of Tanzania at Bukoba was dismissed and Lyimo, J. described the sentence of life imprisonment

which the trial court had imposed to be the statutory minimum prescribed by the law. The appellants were spared the corporal punishment and an order to pay compensation. The first appellate Judge quashed and set aside these punishments, explaining that section 131A under which the appellants were charged and convicted, does not prescribe corporal punishments and an order of compensation. The two appellants have come to this Court on second appeal. Each appellant filed separate memorandum of appeal albeit with identical sets of grounds of appeal.

The background facts trace back to the night of 20th September, 2006 at around 08.00 p.m. The complainant Janetha w/o Baragondoza (PW1) and her husband were returning home from a funeral of a relative. Along the village path, while her husband continued walking home, PW1 excused herself to go to a nearby kiosk to purchase some unspecified necessities. After her purchases, and while rejoining her husband, PW1 met Nestory Bernado (2nd appellant herein). The 2nd appellant, whom she knew, did not return her greetings. As PW1 walked on, 2nd appellant followed from behind and kicked her. It was his second kick which brought her down.

Thereupon, he stripped her naked. When PW1 raised an alarm, it was Patrick Lazaro (1st appellant) in the company of one Andrea Bernado who turned up to join in the assault of PW1. The 2nd appellant was the first to have sexual intercourse with her while his two colleagues were holding her down. Next, the 1st appellant had his turn followed up by Andrea. PW1 was all along crying loudly for help. Several people soon gathered at the scene. According to PW1, the 1st appellant and Andrea managed to flee from the approaching crowd. The 2nd appellant who remained was arrested and taken to the village office. The 2nd appellant was still being held up in the village office when 1st appellant suddenly appeared, and tried to rescue his colleague. Saidi s/o Mohamed (PW2), a commander of traditional security guards at Kanyinya village market was making his final rounds urging shopkeepers to close for the night when he heard distant cries for help. He recognized the voice to be that of PW1. PW2 asked Nicas and Baraka, the two traditional security guards on duty, to go and help out the complainant.

As they approached from a distance, they could see someone lying on the ground while two holding that person down. The two

people who were holding another person on the ground let go and ran away. PW2 and his fellow security guards identified the complainant in her under skirt as the person who was being held on the ground. At the scene, they arrested the 2nd appellant who was by then still half naked with his trousers stripped down to his knees.

The 2nd appellant testified as DW1 on oath in his own defence. He denied the accusation, insisting that he was not arrested at the scene but from his own homestead. He wondered why upon his arrest by the police, he was not taken to hospital to be medically examined to prove his culpability.

The 1st appellant similarly took an oath and testified in his own defence as DW2. He disputed the prosecution evidence which had directly linked him to the offence of rape. He claimed that from around noon he was at the house of the complainant's husband drinking local brew. Later on he moved together with his wife to a liquor shop where he remained until 8 p.m. He and his wife were on their way home when they met the complainant together with Victoria d/o Kajugusi (PW3). PW3 was at the time escorting the

complainant to the village office. He did not understand why he was arrested and later linked up with the offence of rape.

The two appellants appeared before us in person, unrepresented. Both preferred to let the learned counsel for the respondent to first react to their respective grounds of appeal and they would come in later to offer their respective replies. Mr. Hashim Ngole, learned Senior State Attorney, who appeared for the respondent Republic, supported the appeal of the 1st appellant (Patrick Lazaro) but opposed the appeal of 2nd appellant (Nestory Bernado). He promised to explain his reasons during his submissions to follow.

Mr. Ngole initially took on the grounds of appeal contained in the two sets of memorandum of appeal which the two appellants filed separately on 25/9/2014. He urged us to note the obvious similarities of the grounds of appeal in their essence. Mr. Ngole contends that 1st, 2nd and 3rd grounds common to both memorandum of appeal are completely new grounds which the appellants have raised in their second appeal, and which they did not canvass in their first appeal in the High Court. He referred us to pages 51 and 52 of

the record of appeal to confirm to us that the two appellants have canvassed new grounds of appeal in their second appeal which did not feature in the first appellate court. He cemented his position by referring to our decision in **Immedius Mtepa vs. Republic,** Criminal Appeal No. 179 of 2012 to urge us desist from considering all the grounds raised in second appeal which were not raised before the High Court, unless they raise points of law. According to Mr. Ngole, after discarding grounds which did not feature in the first appellate court only one ground common to both sets of memorandum of appeal, which this Court should consider in the second appeal. Simply stated, this ground is whether or not the offence of gang rape was proved as against the 1st appellant (Patrick Lazaro) and 2nd appellant (Nestory Bernado).

We propose to briefly pause at this juncture in order to determine which of the appellants' grounds of complaints should guide the determination of the instant appeal. Clearly, on pages 51 and 52 of the record of this appeal, the main ground of appeal which Patrick Lazaro (1st appellant) presented before the High Court centred on insufficiency of evidence to convict him of the offence of

gang rape. On his part, Nestory Bernado (2nd appellant) complained to the High Court about insufficient evidence to prove that he took any part in the gang rape. In the circumstances, Mr. Ngole has a good reason to urge us to discard all the grounds which the two appellants did not canvass in High Court. The two appellants' four-page rambling grounds of appeal have clearly raised new grounds for the first time on second appeal. These grounds of appeal which were not canvassed in the High Court include, the complaint that the preliminary hearing proceeded without complying with section 192 of CPA; tendering of exhibits without establishing chain of custody; contradicting evidence of prosecution witnesses; failure to offer as a witness the police who investigated their case; and non-compliance with section 240 (3) of CPA before tendering of medical examination report.

We subscribe to the restatement of law which this Court made in **Immedius Mtepa vs. Republic** (supra) which Mr. Ngole referred to us. To that end, *we* agree with Mr. Ngole that the main remaining ground of appeal that has to be considered relates to the contention by both appellants that the offence of gang rape was not proved. The

learned State Attorney embarked on making elaborate submissions to show why he agreed with 1st appellant (Patrick Lazaro) that the offence of gang rape was not proved against this appellant. He submitted that neither the complainant (PW1) nor any other prosecution witness for that matter, shows how the 1st appellant was identified at the incident which took place at the night, which witnesses described as dark night. Mr. Ngole referred us to pages 11 to 15 where the evidence of the complainant is, and argued that nowhere does the complainant indicate how she identified the 1st appellant. Mr. Ngole argued further that since the identification evidence of the 1st appellant is as doubtful as the record shows, his conviction should not be left to stand. To support his legal proposition that the conviction of the 1st appellant should be set aside because of doubtful identifying evidence, the learned State Attorney referred us to the statement which this Court made in **Luziro Sichone and Another vs. Republic,** Criminal Appeal No. 131 of 2010 (unreported) on page 8:

> *"On the value of visual identification evidence, the law is equally well settled. First of all, this type of*

evidence is of the weakest character and most unreliable and should be acted upon cautiously when the court is satisfied that it is absolutely watertight and that all possibilities of mistaken identity are eliminated, even if it is evidence of recognition, as was the case here. See, for instance, ***WAZIRI AMANI v. R.,*** *[1980] T.L.R. 250 and* ***MENGI PAULO SAMWELI LUHANGA & ANOTHER v. R.,*** *Criminal Appeal No. 222 of 2006 (unreported)....."*

Regarding the 2nd appellant (Nestory Bernado), Mr. Ngole had no doubt that evidence of the complainant (PW1) and other witnesses proved the offence of gang rape against him beyond reasonable doubt. Further, because this appellant was arrested at the scene of crime whilst half-naked, the question of his visual identification does not arise. The learned State Attorney believes that this Court has through a number of decisions adequately expressed itself that the question of identification should not arise where an accused person is caught at the scene of crime. He referred to **Luhemeja Buswelu v. Republic,** Criminal Appeal No. 164 of 2012 (unreported) - where the Court stated on page 6:

"...It is for this reason, that we have found ourselves constrained to observe at this early stage that we entirely agree with the learned first appellate judge that in the appeal before her the question of identification was immaterial as the appellant (Luhemeja) was arrested at the scene of the fracas, to put it objectively."

On the claim by the 2nd appellant that the offence was not proved against him, the learned State Attorney disagreed, and referred to the evidence of the complainant and other witnesses like PW2 who corroborated the testimony of the complainant.

Before concluding his submissions, Mr. Ngole for once agreed with the two appellants on a point of law which they did not raise as a ground of appeal in their first appeal, but they did so in their second appeal. The appellants were not informed of their right under section 240 (3) of the Criminal Procedure Act that once a medical report (PF3) had been received in evidence (as exhibit P1) the trial court was in mandatory terms required to inform them of their right to cross-examine the medical witness who prepared it. The learned

State Attorney was quick to point out that even if this evidence of medical examination report is discarded, the remaining evidence of the complainant and other witnesses is sufficient to prove the offence of gang rape against the 2nd appellant.

The 1st appellant had nothing to add when he was called to reply. On his part, the 2nd appellant simply reiterated his innocence insisting that the charge had been framed up to implicate him.

It is pertinent to mention that this appeal before us, is a second appeal wherein the Court confines itself to determination of matters of law. But, there are circumstances where the Court can on a second appeal like the present appeal is, venture into concurrent findings of fact by two courts below. As this Court restated in **Julius Ndahani vs. R.,** Criminal Appeal No. 215 of 2004 (unreported), the Court can interfere with concurrent findings of facts by the courts below if there is a misdirection or non- direction on matters of facts by the courts below. It is this principle that shall guide our determination of this instant appeal before us.

On behalf of the respondent Republic, Mr. Ngole is persuading us that there is sufficient cause for interfering with the concurrent finding of facts by the two courts below that led to the conviction of Patrick Lazaro (1st appellant) who we should allow his appeal. We have considered the submissions of the learned Senior State Attorney contesting the evidence of visual identification of the 1st appellant at the scene of crime during that dark night. We think there is a cause for us to interfere with concurrent finding of facts which suggests that the 1st appellant was positively identified at the scene of gang rape.

With regard to identification of the 1st appellant (who was 2nd accused) at the scene of crime, the trial magistrate said on page 43:

> *"..With the 2nd accused person, PW1 had directly told PW2, PW3 and PW4 who appeared at the scene in answer to her alarm that she had identified her assailants to include the 1st accused person who was found and arrested at the scene, and the 2nd accused person and one Andrea. PW2 and PW4 had in this regard asserted that as they were approaching at the scene they could see 3 persons assaulting PW1 but as they drew closer, 2 of the 3 persons took to their heels while another one*

identified to be the 1st accused person was found and arrested at the scene. According to PW1, she had identified that her assailants included the 2nd accused person and Andrea because she knew the persons even before the date of the incident because they were her village mates and lived in her neighbourhood. There is no dispute that the assault took a considerable time to last. In such circumstances therefore it is my considered view that the identification by PW1 towards the 2nd accused person and Andrea to be among the persons who assaulted her cannot be questioned....."

It is clear from the finding of facts by the trial court, the 1st appellant was not arrested at the scene; and it was the complainant (PW1) who mentioned his name to PW2, PW3 and PW4 who had rushed to the scene to offer their assistance. On his part, the first appellate Judge (Lyimo, J.) supported the trial court's finding with regard to positive identification of the 1st appellant when he stated the following on pages 69 and 70:

"The trial court analysed the facts and evidence and came to the conclusion that the two appellants and the absconded Andrea were the perpetrators of the gang

rape. Although the trial court did not specifically state so, it is clear that it convicted the two appellants based on the credibility of the witnesses and the direct circumstantial evidence implicating the two. I have travelled over the record of proceedings, and I am more than convinced that the trial court cannot be faulted in its findings."

There is no doubt from the evidence, the incident took place around 8 p.m. which the complainant (PW1) described as a fairly dark night. The Court through its many decisions including the **Waziri Amani v. R.** [1980] T.L.R. 250 has insisted that evidence of identification is of the weakest kind and most unreliable. Courts are not expected to rely on such evidence before possibilities of mistaken identity are eliminated and that the evidence is absolutely watertight. In so far as the 1st appellant who was not arrested at the scene of crime is concerned, the two courts below were required to specifically address themselves to the legal question regarding the evidence of visual identification during that dark night.

Upon our perusal of the record, there is no doubt that the complainant (PW1) is the only identifying witness in so far as the 1st appellant is concerned. It would appear from her evidence that the 1st appellant appeared at the scene well after the complainant had been pushed to the ground and stripped naked by the 2nd appellant (1st accused). We agree with Mr. Ngole that there is nowhere in her evidence where the complainant (PW1), specifically shows how she managed to identify the 1st appellant that night or show how long she spent with the 1st appellant during her ordeal to facilitate positive identification. Apart from testifying that it was a fairly dark night, she did not specify how despite the darkness, she could still identify and recognize the 1st appellant.

There is therefore a cause for this Court on second appeal, to interfere with the misapprehension of the identifying evidence of the complainant with respect to the 1st appellant. It is clear to us; the two courts below would not have convicted the 1st appellant had they properly warned themselves of weakness of identifying evidence.

We are of the same opinion like the learned State Attorney, that since the 2nd appellant was undisputedly arrested at the scene of

crime, the question whether he was identified or not does not arise. Decision of the Court, **Luhemeja Buswelu v. Republic** (supra) which Mr. Ngole cited is aptly on the point. The position of the Court when an accused person is caught red-handed on the act of the crime is now well established. In **Stephen John Rutakikirwa vs. R.,** Criminal Appeal No. 78 of 2008 (unreported) an appellant was arrested at the scene of crime. He raised a ground of appeal contending that he was not properly identified at the scene of crime. While rejecting this complaint, the Court observed:-

> *"In the present case, even if there was darkness, the appellant was grabbed by and struggled with the complainant, and was arrested at the scene by PW2 and PW3; and immediately taken to the police. If there was any need of corroboration, we would readily find it in the appellant's own admission in his testimony that he was within the vicinity at that time (**See RUNGU JUMA v R** (1994) TLR. 176. We also find no substance in this complaint."*

As we have pointed out, it is not disputed that the 2nd appellant was arrested at the scene of crime. We think therefore, having been arrested at the scene of the crime, the only question of law calling for our determination is whether the ingredients of the offence of gang rape were proved as against this 2nd appellant. Section 131A (1) and (2) of the Penal Code under which the 2nd appellant was convicted states:

> *"131A. Punishment for gang rape*
>
> *(1) Where the offence of rape is committed by one or more persons in a group of persons, each person in the group committing or abetting the commission of the offence is deemed to have committed gang rape.*
>
> *(2) Every person who is convicted of gang rape shall be sentenced to imprisonment for life, regardless of the actual role he played in the rape."*

From above provisions, there is no doubt the offence of "gang rape" is an aggravated specie of the offence of rape. The phrase "*Where the offence of rape is committed*" appearing at the very beginning of sub-section (1) of section 131A presupposes that in

gang rape, the prosecution must also prove that offence of rape in any of its various descriptions under section 130 has been committed. Unlike the offence of rape under section 130, the phrase: "*is committed by one or more persons in a group of persons, each person in the group committing or abetting the commission of the offence*" appearing in sub-section (1) of section 131A aggravates the committed offence of rape.

It goes without saying that, like what pertains in the offence of rape under section 130 where prosecution must establish both lack of consent and penetration; lack of consent and penetration must similarly be proved in gang rape under section 131A. In gang rape, evidence must in addition prove the role of another person or other persons abetting or assisting in the commission of the rape. Again, the prosecution need not prove that each member of the group achieved any penetration for the offence to be committed. Penetration by one member of the group, facilitated by another or others, will be sufficient to found a conviction. We may dare say that even a female member of a group can be charged and convicted of

gang rape if it is proved that she was a member of the group and abetted or assisted the other member of the group to commit rape.

In the above circumstances, after applying the concurrent finding of facts to the provisions of section 131A (1) and (2), the 2nd appellant undoubtedly committed the offence of gang rape. This is clearly borne out of the record of the trial court which the first appellate court confirmed. On page 41 of the record, the trial magistrate was satisfied from evidence that there was no consent when the 2nd appellant raped the complainant:

> *"From the circumstances of this case there is no dispute that PW1's carnal knowledge was on the material date had and in accordance with the circumstances in which PW1's carnal knowledge was had the act is without dispute termed as rape. I hold as I do because there is evidence by PW1 herself that her carnal knowledge was and against her will and for that account she was at all that material time her carnal knowledge was being had raising an alarm for help. PW2, PW3 and PW4 had in this regard supported that they heard a person who later they identified to be PW1 raising an alarm....."*

Later on page 43 of the record, the trial magistrate was also satisfied the 2nd appellant was arrested at the scene and he was assisted by others to commit the offence:

> *"I hold as I do because* ***there is overwhelming evidence by PW1 that the 1st accused person was among the 3 persons who committed rape against her****. Moreover the 1st accused person was arrested by PW2 and PW4 who had arrived at the scene in answer to the alarm that PW1 had raised. The 1st accused person does not deny that he was arrested at the scene, nor does he offer any reason why he had appeared at the scene."* [Emphasis added].

This Court has on occasions said that the victim of rape is the best witness to prove whether there was penetration or not (see- **Rashidi Abdallah Mtungwe vs. The Republic,** Criminal Appeal No. 91 of 2011 (unreported). Apart from corroborating evidence of other witnesses who arrived and arrested the 2nd appellant at the scene, the evidence of the complainant (PW1) as a victim of the sexual offence, can stand on it its own weight alone, to sustain a

conviction against the 2nd appellant. The relevant section 127 (7) of the Evidence Act, Cap. 6 R.E. 2002 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."*

For the foregoing reasons, the 1st Appellant's (Patrick Lazaro) appeal is hereby allowed, his conviction is quashed and the sentence that was imposed upon him is hereby set aside. He should be set at liberty immediately, unless there is any lawful reason to detain him. Otherwise, the appeal by the 2nd appellant (Nestory Bernado) is devoid of merit and is hereby dismissed. It is so ordered.

DATED at BUKOBA this 24th day of February, 2015.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL