IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 110 OF 2014

JUMAPILI MSYETE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Lyamuya, SRM, Ext. Jur.)

dated the 17th day of February, 2014
in
Criminal Appeal No. 22 of 2013

JUDGMENT OF THE COURT

10th & 14th August, 2015

MASSATI, J.A.:

This is a second appeal. It is against the judgment of A. M. Lyamuya, SRM (Extended Jurisdiction) sitting in the Resident Magistrate's Court at Mbeya, dated 17th February, 2014. Originally, the appellant was arraigned before Mbozi District Court, where he and another were charged with and convicted of the offences of armed robbery and gang rape. His colleague did not appeal.

At the trial Court, it was alleged, first, that on the 8th day of January 1999 at about 21.00 hrs at Nambala village, in Mbozi District, Mbeya Region, a group of four gangsters, including the appellant robbed one Furaha s/o David, of his bicycle, a pair of shoes, 21 kgs of sugar and one bicycle pump, all valued at Tshs. 37,000/= in total, by threatening him with a gun. It was further alleged in the second count, that, the appellant and his associate in crime around the same time and place gang raped one Therezia d/o Layani, who was the wife of Furaha s/o David, who was accompanying him on their way from Ilembo village to Mlangali village. The appellant pleaded not guilty.

The brief facts established from the evidence on record are that: Furaha David and Therezia Layani were husband and wife, residing at Mlangali village. On 8/1/1999, at around 9.00 hrs they were on their way home from Ilembo area. The lady was carrying a baby with her, while the husband was carting several shop items in his bicycle. On reaching a bridge near Nambala village, they were commanded to stop by a group of four persons. As luck would have it, the husband had a torch. He lit it straight and identified one of them, the appellant, who was holding a gun. The gun was fired in the air, and at the command of the gun trotting person the other confederates pounced upon the husband, and searched his person for

money, before tying him with a piece of khanga, and making away with his bicycle, shoes and bicycle pump. The persons then proceeded to rape the wife in turns before his very eyes. However, the husband was later able to untie himself and run away to Nambala village to report the incident. As he was returning to the scene of the crime in the company of one of the village leaders, they saw the wife on the way; who also gave her own side of the ordeal. They slept off their trauma in Nambala village before reporting the matter to the police at Vwawa. The appellant and his partner in crime were arrested on 11/1/1999.

The prosecution paraded four witnesses. The victims of the crime, FURAHA DAVID, and THEREZIA d/o LAISON, testified as PW2 and PW3 respectively. PW2, testified how he was robbed of his properties, and how, by the use of a torch which he had shone on the gangsters, he was able to identify the appellant who was also once his neighbor at Ilembo village before he and his family moved to Mlangali. PW3, told the trial court how the appellant and his compatriots raped her in turns. She was able to identify the appellant, not only because he was the one giving orders around, but also he was one their neighbours at Ilembo village and described the attire that he had put on that night. PW3 also described that night as moonlit and

that PW3 had shone a torch at the appellant. PW4 PATSON NZUNDA, testified how on that night at around 10.00 pm, PW2, gate crashed into his home, and informed him about the incidence, and how he took him back to the scene of crime, where they met PW3 on the way. He heard PW3 complain about how she was gang raped. PW1, D 4632 D/CPL WAZIRI, just recorded the cautioned statements of the appellant and his co-accused, and tendered them as Exhibits P1 and P2 and charged the duo.

On his part, the appellant described himself as a peasant of Ilembo area, a fact, which he had earlier on also admitted at the preliminary hearing. He told the trial court that although he was arrested on 11/1/1999, he knew nothing about the charge. When cross examined, he said that on the night in question (8/1/1999) he was at home and that he neither met nor knew PW2 and PW3.

The two courts below were satisfied that the appellant was sufficiently identified by PW2 and PW3, and that this was corroborated by his own cautioned statement, whose correctness he did not challenge at the trial court. The trial court therefore convicted the appellant of both counts. However on first appeal, the Senior Resident Magistrate (Extended

Jurisdiction) quashed the conviction for armed robbery, on the ground that the offence of armed robbery was non existent at the time it was alleged to have been committed. The conviction for gang rape, was, however upheld. The present appeal is therefore against that conviction and sentence of 30 years imprisonment and 9 strokes of the cane meted out on him.

At the hearing of the appeal, the appellant appeared in person. Earlier on, he had filed a memorandum of appeal consisting of seven (7) grounds of appeal. In the first three grounds, the complaint is that his identification was not watertight. In the fourth ground, the appellant complains that his cautioned statement (Exh. P2) was improperly admitted and acted upon. In the fifth ground, he complains that the PF3 (Exh. P3) was not properly admitted and relied upon. In the sixth ground, the complaint is that the first appellate court applied double standards in using the same evidence in acquitting him of the count of armed robbery; and in upholding a conviction for gang rape. The seventh ground, was that the prosecution case was not proved beyond reasonable doubt. On the basis of those grounds, the appellant prayed that his appeal be allowed.

The respondent/Republic, which was represented by Mr. Joseph Pande, learned Principal State Attorney, did not support the conviction and sentence. He had two major reasons. First, it was his view that the appellant's cautioned statement (Exh. P2) was admitted without giving a chance to him to comment on it. He submitted that this was contrary to law, and referred us to our decision in **BUNDALA MAHONA and RICHARD s/o MHOJA v R**, Criminal Appeal No. 224 of 2013 (unreported). Secondly, the identification of the appellant at the scene of crime was not watertight. He pointed out that PW2 and PW3 did not describe the intensity of the moonlight or the torch that assisted them in identifying the appellant. This discrepancy was further compounded by their lack of description or mentioning of the appellant to PW4 or PW1 or even to the Chairman of the village where the couple spent the night before the incident was reported to the police, as this had the effect of denting their credibility, and the two courts below should have been on alert, he argued. For this, he referred us to the decisions of **SOMI SEMI v R**, Criminal Appeal No. 29 of 2008, **GOODLUCK JACOB & MAFUWE AND ANOTHER v R**, Criminal Appeal No. 35 of 2008, **THOMAS MLAMBIVU v R**, Criminal Appeal No. 134 of 2009, and **SALUM MUSSA v R**, Criminal Appeal No. 1 of 2011 (all unreported). For those reasons, Mr.

Pande supported the appellant's grounds Number 1, 2, 3, 4 and 7 and urged us to allow the appeal.

But before he wound up, we asked him to comment on the appellant's ground No. 6 of appeal in which the appellant was wondering why, on the same evidence, he was convicted on the offence of gang rape, and acquitted of armed robbery. Referring to the first appellate court's reason for quashing the conviction on armed robbery, Mr. Pande submitted that, although by Act No. 10 of 1989, the Minimum Sentences Act was amended to enhance the sentence for robbery by use of weapons, to 30 years imprisonment, the term "armed robbery" was not introduced until later but in essence the offence was already in existence, in 1999, when the appellant is alleged to have committed the offence. So, if that was the reason for quashing the conviction, it was wrong. However, he insisted that, in the light of the evidence on record, there was no possibility of sustaining a conviction for armed robbery, either:

When asked to respond, the appellant said that he was in full support of what the learned Principal State Attorney and had nothing useful to add.

On whether or not the offence of armed robbery was in existence then the appellant supported the finding of the first appellate court.

Before we go into the sixth ground we shall briefly deal with the 5th ground. This ground should not detain us because it has already been dealt with by the first appellate court, which ordered the expulsion of the offensive PF3 from the record.

We now turn to ground number 6 of the memorandum of appeal. This ground faults the first appellate Court for using double standards in acquitting and convicting the appellant of armed robbery and with gang rape respectively, on the same evidence. We have looked at the judgment of the first appellate court. In arriving at the impugned decision, the learned Senior Resident Magistrate (Extended Jurisdiction) relied on a decision of this Court in **DPP v SALUM ALI JUMA** 2006 TLR 193, which observed that:

> *"We have not seen any law which creates the offence of armed robbery..."*

On the basis of that the appellate court concluded that, the offence of armed robbery was non existent when the appellant was arraigned before Mbozi District. On that ground, he quashed the conviction and acquitted the appellant on the count of armed robbery, and set aside the sentence of 30 years imposed on him. From this, it is clear that the acquittal was not based on the evidence, as the appellant appears to believe.

We have looked at the decision of this Court in **DPP v SALUM ALI JUMA** (supra). With respect, that decision was made in an appeal from the High Court of Zanzibar and the statutes under consideration were the Penal Act 2004 and the Criminal Procedure Act, 2004 both of Zanzibar, which as found by the Court do not create the offence of "armed robbery". Those statutes do not apply to this part of the Union. Here the applicable laws were the Penal Code, (Cap 16), the Criminal Procedure Act (Cap 20), and the Minimum Sentences Act (Cap. 90).

By the Written Laws (Miscellaneous Amendments) Act No. 10 of 1989, the Minimum Sentences Act, and the Penal Code, were amended to introduce the offences of "armed robbery" and "attempted armed robbery" although they were not statutorily defined. That notwithstanding, this Court expressly

took cognizance of the existence of that offence in **MICHAEL JOSEPH v R** (1995) TLR 278, where we held that:

> *"Though there is no express and specific definition of what constitutes "armed robbery" it is clear that if a dangerous or offensive weapon or instrument is used in the course of a robbery such constitutes "armed robbery" in terms of the law as amended by Act No. 10 of 1989."*

It is that lamentation, which led to the amendment of the Penal Code through the Written Laws (Miscellaneous Amendments) Act No. 4 of 2004, which introduced the new section 287A which expressly creates and defines the term, "armed robbery".

From the above analysis, two things are clear. First, that the offence of armed robbery has been in existence since 1989, although it was formally defined by statute in 2004 by Act No. 4. So, it is not true that, it was not in existence in 1999, when the appellant was charged with that offence before Mbozi District Court. Secondly, the case of **DPP v SALUM ALI JUMA** (supra) relied upon by the first appellate court was irrelevant and therefore cited out of context. It follows therefore that the appellant was wrongly

acquitted of the offence of armed robbery, if that was the reason for quashing that conviction. But in this judgment we shall make no further comments on that aspect.

We now turn to consider Mr. Pande's submissions on the other grounds of appeal.

It is true that as pointed out above that, the conviction of the appellant is predicated upon two pieces of evidences; namely, visual identification, and his own cautioned statement (Exh. P2).

The cautioned statement was introduced by PW1 and this is what transpired at the trial court.

XD Pros: This is the statement recorded from the 1st accused

Court: Statement read above in court

XD Pros: I produce the statement as an exhibit

Court: Admitted as "Exhibit P2"

From the extract of the proceedings, it is obvious that the appellant was not given an opportunity to comment on the statement before the court

received it as an exhibit. This, we agree with Mr. Pande, and the appellant, was wrong. As we held in **TWAHA ALLY & 5 OTHERS v R**, Criminal Appeal No. 78 of 2004 (unreported) cited in **BUNDALA MAHONA & ANOTHER v R** (supra).

> *"The omission to inform the accused of his right to say something and/or to conduct an inquiry or a trial within a trial in case there is objection raised, result in a fundamental and incurable irregularity".*

So, as rightly submitted by Mr. Pande, the appellant's cautioned was not properly admitted, notwithstanding the fact that the appellant did not object as the first appellate court observed, because, he was never offered the chance to do so; as was his right. Equally misconceived is the adverse inference drawn by the first appellate court for the appellant's failure to cross examine on its contents. The right to cross examine rests on the premise that the evidence was properly introduced in court and the appellant had had an access on it. This was not the case herein. So, Exhibit P2, only deserves to be expunged from the record as we hereby do.

The remaining piece of evidence against the appellant is that of visual identification.

Without fear of contradiction, we must start with the premise that the law relating to the evidence of identification is now fairly settled. And it is that, this type of evidence is of the weakest kind and almost unreliable and courts should not act on it unless all possibilities of mistaken identity are eliminated, and that the evidence is absolutely watertight. See **AZIZ MOHAMED AND ANOTHER v R**, Criminal Appeal No. 15 of 2006 (unreported), **WAZIRI AMANI v R** (1980) TLR 250, **RAYMOND FRANCIS v R** (1994) TLR 100; **R v ERIA SEBATWO** (1960) EA. 174, **DEMETRIUS JOHN @ KAJULI & 3 OTHERS v R**, Criminal Appeal No. 155 of 2013. Where a court has to convict if it is satisfied that the conditions were favourable, it is a matter of practice to look for corroboration, although a conviction could be sustained even if there was no corroboration.

But it is equally true that no hard or fast rules can be laid down as to the manner a trial judge should determine questions of identity, provided that in each case there should be a careful and considered analysis of all the surrounding circumstances of the crime being tried (**WAZIRI AMANI v R**)

(supra). Essentially therefore this means each case will have to be decided on its own peculiar surrounding circumstances.

For the purpose of analysis and the experience enriched from case law, cases of identification may be identified into three broad categories. Visual identification, identification by recognition, and voice identification. In visual identifications, usually, the victims would have seen the suspects for the first time. In recognition cases, the victims claim that they are familiar with or know the suspects. In the last category the victims would usually claim to be familiar with the voice of the suspect although they may or may not have seen him. It is akin to identification by recognition.

Accordingly evidence to prove each of those types of identification would significantly vary in the type, and weight be attached to each. But for each type of identification, evidence could be classified as foundational, complementary, assistive and corroborative. A foundational evidence is that which lays down **how** a victim was able to identify the suspect. Assistive evidence could be that which, or what assisted the victim in the identification process. Corroborative evidence is that which is supportive of what the victim has alleged. Thus in recognition cases, the foundational evidence

would be how the victim came to know the suspect. Assistive evidence would include, the time of the day the incident happened, the type and intensity of the light etc. which enabled the victim to ascertain the identity of the suspect. Corroborative evidence would consist of say, the suspect being found in possession of the victim's property stolen in the course of theft; or naming the suspect at the earliest. In visual identification, the foundational evidence would consist of the description of the suspect, his body, complexion, attire etc. The light and intensity of the light, would be assistive, whereas, identification at an identification parade or being found in possession of the victim's stolen property would be corroborative.

Of these types of identification, it has been held that identification by recognition is more reliable than that by strangers or by voice; although even in recognition cases mistaken identification may be made (See **ISSA s/o MGARA @ SHUKA v R**, Criminal Appeal No. 37 of 2009, **MAGWISHA MZEE, SHIJA PAULO v R**, Criminal Appeals No. 465 & 467 of 2007 (both unreported). Visual identification has been described as the weakest, (**WAZIRI AMANI v R** (supra). Voice identification has been described as the most unreliable (**NURU SELEMANI v R**) (1994) TLR 93.

Accordingly the type of evidence required to prove identification, might differ in some aspects, but some may be common in all types of identification. Foundation and assistive evidence, for instance, is necessary in all types of identification, but corroborative may not be. For instance, in visual identification, identification parades, or recent possession, has invariably been used to corroborate, but it may not be so in recognition cases. In visual identification, description of the suspect build or attire may be necessary but in recognition cases, naming the suspect would be sufficient.

In the present case, the type of identification relied upon is that of recognition. According to PW2 and PW3, the appellant was their neighbor in Ilembo village. The appellant admitted that he was a resident of Ilembo village, in the preliminary hearing and his defence which was confirmed by his co-accused, DW2. Although there was no evidence on what led to his arrest according to PW2 and PW3, the case was reported the next day, on 9/1/1999, and two days later, the appellant was arrested and charged with the crimes. PW2 and PW3 also testified that they were assisted by a torch which PW2 was carrying, which he shone on the appellant to confirm that it was him. They both described the type of clothes the appellant wore on the

night which, in his defence the appellant did not seriously dispute. But PW3 also came into close contact with the appellant when he was the first to rape her after tearing off her underwear; and even silenced her when she tried to shout for help.

The circumstances in the present case are slightly distinguishable from those relied on by Mr. Pande in the cases of **SOMI SEMI v R**, and **JACOB @ MAFUWE & ANOTHER v R**, he cited before us. In those cases, although the victims also claimed to have known the suspects before they did not describe their build or attire. Although in the two cases above, the victims were also robbed, the encounter did not last long after grabbing the victims' properties. Here, after robbing, the appellant and his confederates, took turns to rape PW3, thus necessitating a closer encounter.

For the above reasons, and with all due respect, we do not agree with the learned Principal State Attorney. We are satisfied in this case that the appellant was sufficiently identified by PW2 and PW3. As such, we think that the offence with which he was convicted was proved beyond reasonable doubt.

Consequently, we find that the appeal lacks merit. It is accordingly dismissed in its entirety.

DATED at **MBEYA** this 12th 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