

**IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA**

(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 405 OF 2015

ELIAS YOBWA @MKALAGALE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(A.Mohamed, J.)

dated 3rd day of June, 2015

in

Criminal Appeal No. 61 of 2013

JUDGMENT OF THE COURT

8th & 25th April, 2016

ORIYO, J.A.:

The appellant seeks to challenge the conviction entered against him for unnatural offence contrary to section 154(1)(a) of the Penal Code, by the District court of Mpwapwa at Mpwapwa and the sentence of thirty (30) years imprisonment imposed as a result. On his first appeal to the High Court, the trial court decision was confirmed, hence this second appeal to the Court.

The brief facts that led to the conviction and sentence of the appellant mainly came from the evidence of PW2, the victim; PW3, the

first person to arrive at the scene and subsequently were corroborated by the medical report, Exhibit P1. PW2 Aziza d/o Jackson aged 13 years, (the victim), alleged that on the material day and time, she was on her way home from shopping. She met the appellant who requested her to direct him to the house of one Malengu. While on their way, the appellant told PW2 that he was in love with her. PW2 rejected him and ran away. The appellant got on his bicycle and chased her. However, he managed to get hold of her, fell her on the ground, removed her underpants and lay on top of her. PW2 tried to resist in vain. The appellant unsuccessfully tried to insert his penis inside her vagina. He then inserted his penis in her anus and sodomised her. PW3, David Lulengo appeared at the scene with a torch and the appellant fled.

In his defence before the trial court, the appellant denied the allegations leveled against him.

At the hearing of the appeal, the appellant was unrepresented; he appeared in person. The respondent Republic was represented by Mr. M.V. Mwamunyange, learned Senior State Attorney. The respondent Republic supported both the conviction and sentence.

The appellant raised six (6) grounds of appeal in his memorandum of appeal which can conveniently be condensed into one main ground:-

That, the conviction was based on weak, visual identification evidence.

Understandably, the appellant, being a layman preferred the learned State Attorney to make submissions first, while he reserved his right of reply thereafter, if necessary. Mr Mwamnyange submitted that the main issue in the appeal is on the identification of the appellant. In his view, the evidence adduced by PW2 and PW3 sufficiently proved that the appellant was identified, the offence having been committed at around 7:30 pm and they previously knew each other before the incident. He submitted that the conditions during the commission of the offence were conducive and accurate for proper identification of the appellant. The learned State Attorney urged us to find that the appellant was properly identified.

Notwithstanding the submissions by the respondent Republic in support of the conviction and sentence, the appellant firmly maintained his innocence. He forcefully submitted that he was not properly identified during the alleged incident. He queried that if true, PW2 identified him

and named him to PW3, why was there a delay in arresting him. He stated that the unexplained delay in arresting him casts doubt on the credibility of PW2 and urged us to allow the appeal.

From the foregoing submissions, there is no doubt in our minds that the prosecution case against the appellant hinged essentially on the evidence of visual identification. After surveying authorities on the subject matter and the need to guard against possibilities of mistaken identification, the learned trial Judge was in no doubt that the appellant was positively identified and there was no possibility of mistaken identity when he stated as follows:-

“in this case the victim had ample time to observe the appellant when they walked together, ostensibly the victim leading the appellant to his relative’s place up to the ensuing unlawful act by the appellant. As it was evening, there was sufficient sunlight for the victim to properly recognize the appellant.”

It is trite law that no court should act on the evidence of visual identification, unless, all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence is watertight. See **Ally**

Snabam versus Kepuolic, Criminal Appeal No 32 of 2011, (unreported); Waziri Amani v. Republic 1980 TLR. 250.

In the present appeal the offence was committed at around 7:30 pm. The learned State Attorney submitted that it was day time, but in law, **7:30 p.m.** is night time as per the definition of **"night"** time as provided for under **section 5 of the Penal Code, Cap 16.** Section **5** provides:-

*"5 – In this Code, unless the context requires otherwise - **"night"** or **"night time"** means the period between seven o'clock in the evening and six o'clock in the morning;"*

[Emphasis added]

Therefore 7:30 pm is night time and the prevailing conditions were not conducive for positive identification of the appellant. In **Raymond Francis versus Republic, (1994) T.L.R,** this Court held:

"it is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of utmost importance."

Bearing in mind the above principles, we are of the settled view that the appellant was not correctly identified at the scene of crime taking into account the fact that PW2, upon cross examination, said that she did not know the appellant. Moreover, PW2 simply said she identified the appellant but failed to state what kind of light, which enabled her make a correct identification at that particular time.

In the case of **Joseph Michael and Another, Criminal Appeal NOs. 213 & 215 OF 2014**, the Court cited the case of **Said Chally Scania Vs. Republic, Criminal Appeal No. 89 of 2005** (unreported), where, in similar circumstances it was held as follows:-

"We wish to stress that even in recognition cases, clear evidence on source of light and its intensity is of paramount importance. This is because, as occasionally held, even when a witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made".

The record shows that the incident occurred on 12/05/2012 and the appellant was arrested on 14/09/2012. If as alleged by PW.2 and PW.3 in their evidence that they identified the appellant during the incident and

they named him at the earliest opportunity, the question is why was the appellant not arrested on the same night?

There are a number of decisions of this Court regarding delays in arresting an accused. Amongst them is **Maswed Seleman versus Republic, Criminal Appeal No 189 of 2007**, where it was observed as follows:-

"To us, it is obvious this aspect of unexplained delay in arresting the appellant was not addressed by both courts below. In our opinion, had it been brought to the attention of the learned appellate Judge; he would have arrived at a different conclusion".

The Court also underscored the fact that unexplained delay in arresting a suspect casts doubt on the credibility of a witness.

Similarly, in this case, the delay in arresting the appellant casts doubts on the credibility of PW2 and the possibility of mistaken identity cannot be ruled out.

In view of the foregoing, it is doubtful that the appellant was properly identified by PW2 and PW3. This being a criminal case, the benefit of doubt goes to the appellant. In this connection and as

already stated, we are cautious but feel bound to reverse the concurrent findings of fact made by the two lower courts in this aspect.

Consequently, we allow the appeal, quash and set aside the conviction and sentence. The appellant is to be released from custody forthwith unless otherwise lawfully held.

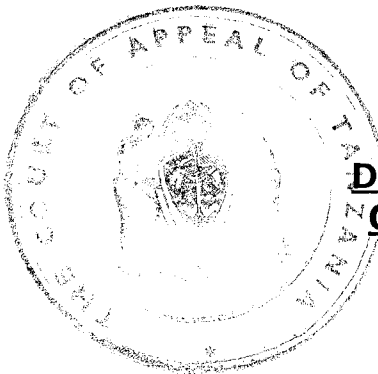
DATED at **DODOMA** this 21st day of April, 2016.

E.A. KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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




E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL