

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

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

CRIMINAL APPEAL NO. 586 OF 2015

HAMISI SHINGO..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the Resident Magistrate's Court of Singida
at Singida)**

(Lema, PRM - Ext. J.)

dated the 11th December, 2015

in

PRM Criminal Appeal Case No.17 of 2015

JUDGMENT OF THE COURT

27th & 28th April, 2016

JUMA, J.A.:

On 22nd November 2000 the appellant HAMISI SHINGO @ MOROGORO, MISANGA PATRIC (first accused) and ATHUMAN JUMANNE (second accused) were convicted by the District Court of Iramba at Kiomboi, for the offence of rape contrary to section 130 (2) (a) and 131 (1) of the Penal Code. They were each sentenced to serve thirty (30) years in prison and to suffer twelve (12) strokes of the cane.

Apparently, the appellant did not express his intention to appeal to the High Court within ten days from the date of his conviction and sentencing by the District Court as was required by section 361 (1) (a) of the Criminal Procedure Act, Cap 20 (CPA). He applied to the High Court and was on 11th June 2014 granted leave to file his belated notice to express the intention of appeal and the petition of appeal. His first appeal to the High Court was transferred to the Resident Magistrate's Court of Singida and was assigned to W.E. Lema, the Principal Resident Magistrate on Extended Jurisdiction. That first appeal was dismissed in a judgment that was delivered on 3rd December, 2015.

The appellant is displeased with the decisions of the trial and first appellate courts regarding his conviction and sentence. He has brought this second appeal, which he predicated on a total of seven grounds of complaints. In the **first** and **second** grounds, he complains that the offence of rape was not proved beyond reasonable doubt more so because the medical officer who examined and treated the complainant was not called to prove whether rape in fact took place. In addition, the medical examination report which the trial court admitted as exhibit P1 lacks

requisite weight and was not corroborated by the medical officer, who did not testify. The **third** ground faults the visual identification evidence of the complainant for failing to meet the standard the law has prescribed for proper identification. In the **fourth and fifth** grounds the appellant contends that the evidence of PW3 and that of his co-accused Athumani s/o Jumanne (DW1) cannot in law corroborate the evidence of the complainant that he (the appellant) had raped her. In the **sixth** ground the appellant expressed his concern why, one person known by a single name "Mayo" who was mentioned as a possible eye witness to the rape, was not called to testify on what he saw. In the **seventh** ground of appeal the appellant complains that he was convicted more because he failed to put an effective defence than by proof of the offence of rape beyond reasonable doubt.

The brief background to this appeal shows that the 12th June 2000 was just like any other working day for the complainant Mwanahamisi Athumani (PW1). She worked as an attendant at Alfa Hotel in Shelui. Around 11.00 pm she was at work serving alcohol to hotel customers. A customer, whose name she did not divulge, wanted to hire a room and

asked PW1 to show him a guest house. PW1 walked this customer to a nearby *"Jumapili Guest House"* where this customer rented a room. But before PW1 left, this customer gave her Tshs. 5,000/= to buy cigarettes for him. On her return from this errand, the customer sent her out again, this time to light up one of his cigarettes.

As she was returning back with a lighted cigarette, a person she did not know accosted her. He too wanted her to light up his cigarette. The complainant retorted back that the man's cigarette was already alight. That was the moment when the man became nasty and used unpleasant words against PW1. He accused her of being of loose morals and sleeping around with bus station touts. He knocked her to the ground twice. She picked herself and ran to the customer who had earlier sent her to light his cigarette. The customer opened his door room to find out what was amiss. The man who had assaulted her claimed that the complainant owed him an unspecified amount of money and he had earlier bought her drinks. He now wanted to be paid back by sex but not monetary refunds!

Sensing danger, the complainant ran inside the guest house compound and sat down. But this refuge was short lived because

Mohamed Salum (PW3) who was the night watchman guarding the premises, asked her to leave, literally pulled her out. She later learnt from PW3 that it was the appellant who had assaulted her. The appellant was waiting outside when PW3 forced her to vacate the guest house compound. According to PW1, this person (who she learnt from PW3 was the appellant) grabbed and dragged her to a dark secluded place where he was joined by Misanga Patrick, Athumani Jumanne and Hassan Jumanne who were walking from the direction of Kondo Guest House.

The appellant pushed her to the ground whereupon Missanga Patrick used his knife to slash loose her underpants and waist beads and triumphantly announced to his colleagues that she was ready for them. With his colleagues holding the complainant down, the appellant unzipped his trousers and had penetrative sexual intercourse, ejaculating twice. Athumani Jumanne took his turn to penetrate her vagina and ejaculating once. Hassan Jumanne (who escaped arrest) had penetrative sexual intercourse as well. The appellant took the complainant to a nearby river bank where he had another round of sexual intercourse with her. Only Missanga Patrick did not have sex with her that night.

PW1 narrated how she picked herself up. It was a person PW1 described as of unsound mind who escorted her to Shelui Police Post where she reported her overnight ordeal. She was told to return the following morning when she was issued with a PF3 and referred to hospital for medical examination and treatment.

PW3 recalled while on his watch guard, he first heard shouts and sounds of running footsteps before PW1 and the appellant appeared near his place of work. PW1 was ahead and the appellant was behind, chasing her. The appellant began to assault the complainant. When PW3 asked why he was beating the complainant, the appellant replied that PW1 was his long-time friend. The appellant took her behind the guest house. PW3 did not know what happened till the following morning when he heard that she had been raped.

Police Corporal Paschal (PW2) visited the scene of crime where he recovered beads, three condoms and undergarments. PW2 testified that the complainant told him that she could identify four people who had committed the rape— Misanga, Hassan Jumanne, Athumani and Morogoro. PW2 began to search for the accused. The appellant escaped to

fishermen's Magungumka village. He was later arrested at a pub when he returned.

In his defence, the appellant denied taking any part in the rape of the complainant.

At the hearing of the appeal, the appellant acted in person while the respondent Republic was represented by learned State Attorney Mr. Evod Kyando. The appellant informed the Court that he placed full reliance on his grounds of appeal and would prefer the learned State Attorney to first address these grounds before he would come in response.

The learned State Attorney supported the appeal. He expressed himself that he is not in any doubt on evidence, the complainant was raped. He undertook to demonstrate why he thought that although the complainant had been raped, it was not the appellant who committed that offence. Responding to the complaint over the probity of the medical examination report (PF3) appearing in first and second grounds of appeal, Mr. Kyando submitted that the first appellate court had discarded the evidence of PF3 but still went ahead to convict the appellant because there

was the evidence of the complainant herself which can stand alone to convict under section 127 (7) of the Evidence Act, Cap. 6. The learned State Attorney submitted that while he agreed with the first appellate court that there is sufficient evidence to support the conclusion that the complainant was in fact raped, he does not agree with the conclusion that the appellant was properly identified as the person who raped the complainant.

He agreed with the third ground of appeal where the appellant faults the identification evidence of PW1. He submitted that since the offence was committed at night the complainant should have explained the intensity of the moonlight and how it helped her identify the appellant who she did not know before the night of the incident. She was only later informed by PW3 that it was a person nicknamed "Morogoro" who had assaulted her that night. In so far the learned State Attorney was concerned; this was a case where an identification parade was required to enable the complainant to identify her assailants. He submitted further that the identity of the appellant was planted on the complainant much later by PW3 who only saw the assault but not the actual incident of rape which

took place behind the guest house. The duty regarding proper identification under difficult circumstances like night is not diminished simply because the offence took several hours to complete, he submitted.

Mr. Kyando similarly agreed with the fourth and fifth grounds of appeal with regard to probity of evidence of the watchman (PW3) and the second accused (who testified as DW1). He submitted that PW3 witnessed only the assault aspect but did not witness the alleged rape. He only came to learn about the rape the following morning when the complainant reported the matter to the police. On the evidence of DW1, the learned State Attorney observed that the evidence of this witness was not used by the two courts below to convict the appellant.

As rightly observed by the learned State Attorney, the main issue in this appeal is whether the identification of the appellant was proper, leaving no room for possibility of mistaken identity.

The Court through its several decisions has warned about the danger of mistaken identification where an offence takes place in the conditions that are difficult or unfavourable like identification taking place at night-

time. The poorer the quality or intensity of a source of light the greater the danger of mistaken identity. In **Gabriel Mwakanemela vs. R.**, Criminal Appeal No. 377 of 2013 (unreported) the Court approvingly referred to the observation it made in the earlier decision in **Said Chally Scania v. R.**, Criminal Appeal No. 69 of 2005 (unreported) where the Court stated:-

"...We think that where a witness is testifying about identifying another person in unfavourable circumstances, like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all aids to unmistakable identification like proximity to the person being identified, the source of light and its intensity..."

In her evidence, apart from generally identifying moonlight as the source of light, the complainant (PW1) does not disclose such important details as intensity of the moon that night, and her proximity to the appellant. Even the name of the appellant as one of the youths who had raped her appears to have come much later from the watchman. While the complainant knew other accused persons, she did not know the appellant.

And as rightly suggested by Mr. Kyando, an identification parade was needed in the circumstances. The complainant stated:

*"...I knew accuseds before. **It was the first time to meet Morogoro.** On that night there was moonlight and I was able to see and identify the accused persons. I even mentioned Missanga and Hasani. The accused were then arrested. The third accused had absconded but he was arrested recently..."[Emphasis added].*

Later, while being cross examined by the appellant (on page 77 of the record) the complainant confirmed that it was PW3 who furnished her with the identity of the appellant:

*"...**The watchman told me the one who kicked me was Morogoro. That is when I came to know your name.** ... The **watchman saw you and identified you**....."[Emphasis added].*

W.E. Lema the learned Principal Resident Magistrate (EJ) unquestionably believed that the complainant identified the appellant without addressing herself on the dangers of mistaken identity in an

offence that was committed at night under difficult and unfavourable environment for positive identification. She stated:

"PW1 identified the appellant by his name after being told by PW3 who eye-witnessed the appellant attacking PW1. PW3 witnessed them while they were together and finally the appellant pulled PW1 at the back of the guest house. Therefore PW3 heard nothing till on the following day when he heard PW1 complaining to have been raped by the appellant was attacking/assaulting PW1 and yet pulled her at the back of the guest house till the dry river where they committed the alleged rape. PW3 witnessed this till when...PW1 was pulled at the back of the guest house. PW3 identified the appellant vividly..."

It seems to us that Lema- PRM EJ did not take into account the settled principle requiring the courts to be on guard against the dangers of mistaken identification before convicting where offences were committed under difficult and unfavourable conditions, in this instant night-time.

In the end result, we have come to the conclusion that this appeal has merit and the same is allowed. The conviction of the appellant is

quashed and the sentence is set aside. The appellant be released forthwith unless otherwise lawfully held.

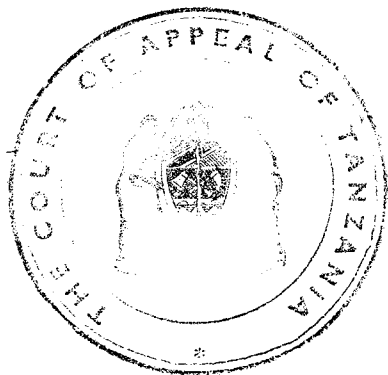
DATED at **DODOMA** this 27th day of April, 2016.

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