IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MJASIRI, J.A. And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 279 OF 2013

SION BENARD .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Dar es Salaam.)

(Bongole, J.)

Dated the 16th day of August, 2013
in
HC. Criminal Appeal No. 134 of 2006

JUDGMENT OF THE COURT

25th April & 5th May, 2016

MBAROUK, J.A.:

In the District Court of Kilosa at Kilosa, the appellant, Sion Benard was charged with the offence of rape contrary to sections 130 (2) (a) and 131 (1) (c) of the Penal Code, Cap. 16 R.E. 2002. He was convicted and sentenced to thirty (30) years imprisonment with hard labour. Dissatisfied, he appealed to the High Court (Bongole, J.) where

his appeal was dismissed for want of merit, hence he has preferred this second appeal.

The facts of the case which led to the trial and subsequent conviction of the appellant can be briefly stated as follows: That on 22/1/2011 at about 19:00 hrs when Maria d/o Kiware (PW1) was on her way back home from a Pombe Shop, she met the appellant. She deposed that, the appellant asked to make love to her, but PW1 refused. She further deposed that the appellant had on another occasion asked her to make love to her but she refused. He told her that he was going to do it on that day. PW1 added that, she was then brought down by the appellant, who then held her by the neck and she was unable to raise an alarm. Thereafter, PW1 contended that, the appellant undressed her and started to rape her, and after he was satisfied, he took a piece of wood and pushed it into her vagina. The appellant then left PW1 and ran away. She then cried for help and one of her neighbours came to her rescue and sent her to her brother where they removed the said wood from her vagina. She was then sent to the

hospital where she was admitted for a month. The appellant was then arrested on the following morning.

In his defence, the appellant denied to have committed the offence. He simply testified that, he went to the village where PW1 lived for the purpose of working on a farm of Boniface Kilawe. He further testified that, it was his first time to have seen PW1 at the trial court. He then contended that, on 21/1/2011, he was working on the farm until 18:00 hrs. when he went back home. To his surprise, he was arrested next morning and charged with the offence of rape.

In this appeal, the appellant fended for himself, whereas Ms. Anna Chimpaye, learned State Attorney, represented the respondent/Republic.

The appellant preferred a memorandum of appeal containing nine grounds of appeal, but in essence, they can boil down to three main grounds as follows:-

1. *That the first Appellate Judge grossly erred in law and fact to convict the appellant relying on un-credible visual identification of PW1 against the appellant at the scene of crime because the alleged identification did not follow/meet the guidelines developed by court in visual identification cases, for instance the identifying witness did not disclose the source of light which aided her to see and recognize the appellant on the fateful night.*
2. *That the first Appellate Judge grossly erred in law and fact to convict the appellant relying on the evidence of PW1 (victim) without subjecting it to close scrutiny as she was not sane at the time of the occurrence of the crime because she was coming from pombe shop, hence her evidence should be approached with care before relying on it as basis of conviction.*

3. *That the first Appellate Judge grossly erred in law and fact by not drawing an adverse inference against the prosecution side for failure to summon as witnesses PW1's neighbour who is alleged to assist the victim immediately after the incident and those who helped her to remove the piece of wood from her vagina to come to testify to the effect hence the omission weakened the inference in proving the prosecution case beyond reasonable speck of doubt.*

At the hearing, the appellant prayed to adopt his grounds of appeal and opted to allow the learned State Attorney to submit first, and if the need arises, he will make his submissions later.

On her part, the learned State Attorney, from the outset indicated not to support the appeal. She first requested the Court to allow her not to argue on some grounds, because they were not raised at the High Court. In support of her argument, she cited the decision of this

Court in the case of **George Maili Kemboge v. the Republic,** Criminal Appeal No. 324 of 2013 (unreported) where it was held that a matter not raised in the first appellate court cannot be raised in a second appeal. In fact that is the main reason for us to reduce the number of grounds of appeal to only three grounds.

In her reply to the first ground of appeal concerning identification, the learned State Attorney submitted that even if there is no direct evidence as to whether PW1 identified the appellant at the scene of crime, she strongly argued that PW1 recognised the appellant. According to her, the record shows that PW1 knew the appellant before as he once wanted to make love to her but she refused. She added that on the day of the incident, PW1 testified that, the appellant repeated his demand of making love to her and she refused. For that reason, she urged us to find that PW1 recognised the appellant at the scene of crime. In support of her argument, she cited to us the case of **Athuman Hamisi @ Athuman v. Republic,** Criminal Appeal No. 288 of 2009 (unreported) where this Court cited a Kenyan case of **Kenya**

Chea Thoye v. Republic, Criminal Appeal No. 375 of 2006 (unreported) where the Court of Appeal of Kenya held that:-

> *"Recognition is more satisfactory, more assuring and more reliable than identification of a stranger."*

She then urged us to find the first ground on identification devoid of merit.

In her reply to the 2nd ground of appeal on the complaint that PW1 was drunk hence her evidence was not trustworthy to be relied upon, the learned State Attorney submitted that, not everyone who is drunk cannot understand what transpired around him/her. She then urged us to find that PW1 identified the appellant as the one who requested her to make love to her and she fully understood what transpired. She therefore prayed for the 2nd ground of appeal to be devoid of merit too.

As for the 3rd ground of appeal, the learned State Attorney submitted that, failure to summon PW1's neighbours did not weaken the prosecution's case, because according to section 143 of the Evidence

Act there is no specific number of witnesses required for the prosecution to prove their case. In addition to that she cited section 127 (7) of the Evidence Act in support of her argument. She then urged us to find the 3rd ground of appeal devoid of merit too.

In his rejoinder submission, the appellant submitted that, there is no evidence which established that he was clearly identified by PW1 at the scene of crime. He reiterated that he did not commit the offence charged against him, therefore he prayed for the Court to set him free.

To begin with the ground of complaint on identification, it is now settled that evidence of visual identification especially when the incident happens at night is of the weakest kind and no court should act on it unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that such evidence before it is absolutely water-tight. Various decisions of this Court have given guidelines of the issues to be considered, such as: -

- Time the witness had with the accused under observation.

- The distance from which the witness had the accused under observation.
- If there was any light, then the source and intensity of such light.
- Description of the appellant's attire. Also whether he was tall or short.
- Whether the witness knew the appellant before.

See **Waziri Amani v. Republic,** (1980) TLR 250 and **Raymond Francis v. Republic,** (1994) TLR, 100 to name a few.

Taking into account that the alleged offence took place at 7.00 p.m. at night, and as conceded by the learned State Attorney that there is no direct evidence which establishes that the appellant was identified, hence we are constrained to find that the appellant was not properly identified at the scene of crime. This is because, the evidence of PW1 is completely silent as to how she identified the appellant at the scene of crime. We are of the opinion that a mere assumption that it was the appellant who earlier on asked PW1 to make love to her cannot form the basis of a sound conviction in law. The prosecution's evidence on

identification was not water-tight. In addition to that, we are of the view that the case of **Athuman Hamisi @ Athumani,** (supra) is distinguishable from this case, because, the conditions which the complainant recognized the appellant in that case differ from this case, hence the possibility of mistaken identity in this case was not sufficiently eliminated. For such failure, we are of the view that, the prosecution has failed to provide sufficient evidence which could have eliminated the possibilities of mistaken identity at the scene of crime. We are therefore hesitant to agree with the learned State Attorney that just because PW1 knew the appellant before, mistaken identification was eliminated. We are of the view that as the incident occurred at night, PW1 should have explained the source of light or even state how he recognized the appellant's voice which enabled her to identify and recognize him. In the absence of those factors, the possibility of mistaken identity cannot be avoided. We think that the case against the appellant was not proved beyond reasonable doubt hence, we are constrained to give the benefit of such doubt to the appellant. For that reason, we find the appellant's 1st ground of appeal to have merit.

We are of the opinion that, that ground alone can dispose of the appeal, hence, for the reasons stated herein above, we find that the case against the appellant was not proved beyond reasonable doubt. We therefore quash the conviction and set aside the sentence thereof. In the result, we order the appellant to be released from prison forthwith unless otherwise held for some other lawful cause.

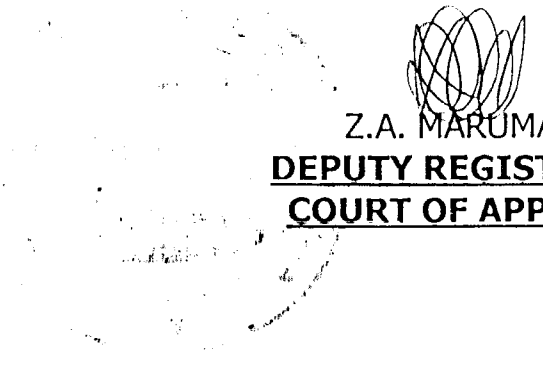
DATED at **DAR ES SALAAM** this 28th day of April, 2016.

M.S. MBAROUK
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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



Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL