IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MMILLA, J.A. MWANGESI, J.A., And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 374 OF 2016

BARIKI ISAYA URIO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Munuo, J.)

dated the 21st day of February, 2002
in
(DC) Criminal Appeal No. 135 of 2001

JUDGMENT OF THE COURT

26th September & 3rd October, 2018

KWARIKO, J.A.:

Formerly, the appellant herein was arraigned before the District Court of Moshi for the offence of rape contrary to sections 130 (1) (a) and 131 (3) of the Sexual Offences (Special Provisions) Act No. 4 of 1998 (the SOSPA). It was alleged by the prosecution that on the 26th day of March, 2001 at about 21:00 hours at Mwika Kirueni Village within Moshi District in Kilimanjaro Region, the appellant had sexual intercourse with one LIANAEL

w/o URIO, a woman aged 72 years without her consent. He denied the charge and the case went to full trial. At the end of the trial he was convicted and sentenced to 30 years imprisonment with an order of compensation to the complainant of Tshs 100,000/=. His appeal before the High Court was not successful. Undaunted by the double failure, the appellant has come to this Court on a second appeal.

The facts of the case at the trial can briefly be recapitulated as follows: According to the complainant LIANAEL URIO (PW1), soon after she retired to bed on 26/3/2001 at 9:00 pm, a person emerged from under the bed and put off the wick lamp (koroboi). However, PW1 was firm that she identified that person as the appellant herein. The appellant pulled her from the bed where she fell down and raped her, and when he was satisfied he ran away leaving her on the floor.

Meanwhile, PW1's granddaughter one GLORY PHILIPO MLAY (PW2) who was sleeping in the same house heard a cry from PW1 saying that 'Bariki unaniua', 'Bariki unaniua', literally means 'Bariki you are killing me', 'Bariki you are killing me'. She approached PW1 and found her struggling with a person on the floor. She did not see the face of that person because

the wick lamp had been put off and it was dark. At the same time PW1's neighbour MARTHA THOMAS URIO (PW3) heard a child's alarm that, her grandmother was dying and went to see PWI whom she found with a wick lamp which was off. However, PW1 told her that Bariki had beaten and raped her. PW3 went to Bariki's grandmother and informed her of the episode. She accommodated PW1 in her house that night and reported the incident to their ten cell leader. Together with other neighbours they looked for the appellant from every possible place in vain.

It was further revealed that, on the following day PW1 reported to the police station where she was issued with a PF3 to go to hospital for treatment. The PF3 was admitted at the trial as exhibit P1.

In the evidence, it was not shown how and when the appellant was arrested, but No. WP 810 Sgt. JASINTA (PW4) testified that she interrogated him on 1/5/2001 at about 6:00 pm and he admitted to the allegations. His cautioned statement was taken and was admitted in court as exhibit P2.

In his defence the appellant testified that he was arrested on 20/4/2001 and taken to police station where he was surprised to be told that he had committed rape. The appellant's two witnesses MAMA MLAY URINGO (DW2), his mother, and JOROBAM MBUYA (DW3), his guardian, said they knew nothing about this incident, as the appellant had been at large from February, 2001.

With that evidence, the trial court held that the prosecution case against the appellant was proved beyond reasonable doubt. He was convicted and sentenced as such. The first appellate court upheld that decision. It was upon that decision that the appellant filed the present appeal.

In his memorandum of appeal before this Court the appellant, through his own lay hand, raised six grounds of appeal which raise five important grounds of complaint because the second and third grounds of appeal raise the same issue. These grounds are summarized as follows:

1. That, the appellant was convicted on the basis of a defective charge.

2. That, the appellant was not correctly identified at the scene of crime.
3. That, the appellant's cautioned statement was illegally tendered in evidence.
4. That, the PF3 (exhibit P1) was admitted in evidence contrary to section 240 (3) of the Criminal Procedure Act [CAP 20 R.E. 2002].
5. That, the prosecution evidence was contradictory, inconsistent, incredible and uncorroborated.

At the hearing of the appeal the appellant appeared in person unrepresented, fending for himself, while the respondent/Republic was represented by Ms Agnes Hyera learned Senior State Attorney. After the Court had explained the substance of his grounds of appeal, the appellant being lay person only adopted the same without more and left to the State Attorney to respond to them.

Ms Hyera started her submission by supporting the appeal, specifically as regards to the first and second grounds of appeal

summarized herein. In respect to the first ground of appeal Ms Hyera was of the view that while the first part of the provision of law which creates the offence was correctly cited; the problem lay on the part of the provision for sentence. That, the cited section 131 (3) of the SOSPA is in relation to a victim of the offence aged below ten years; whereas the complainant in this case was aged 72 years. However, Ms Hyera was quick to argue that, no any injustice was occasioned by that omission because the appellant was sentenced to thirty (30) years imprisonment and not life imprisonment provided in the cited provision. She thus contended that the omission is curable under section 388 of the Criminal Procedure Act [CAP 20 R.E. 2002] (the CPA).

In respect of the second ground of appeal she argued that, PW1 could not have positively identified her assailant. This is because, she said, that soon after the invasion the attacker put off the wick lamp (koroboi) which was the source of light at the material time. She stressed that, even if PW1 said she knew the appellant before, there were no favourable conditions for proper identification. She finally contended that, PW1 did not mention the intensity of light obtained at the scene. To that regard Ms Hyera

referred this Court to the case of **DANIEL s/o PAUL @ MEJA v. R,** Criminal Appeal No. 307 of 2016, CAT at Arusha (unreported). For these reasons Ms Hyera urged us to quash the conviction and set aside the sentence meted out against the appellant.

Following the State Attorney's submission the appellant did not have anything in rejoinder.

On our part, we will start with the issue of the charge which forms the appellant's complaint in the first ground of appeal. At the outset we wish to point out that the provisions in the SOSPA have been replicated in the Penal Code [CAP 16 R.E. 2002] (the Penal Code). However, section 131 (1) (a) cited in the charge does not exist.

It is the requirement of law that a charge should contain a statement of the specific offence or offences with which the accused is to face at the trial, so that he can well prepare his defence. Section 132 of the CPA says thus;

> *Every charge or information shall contain, and shall be sufficient if it contains, a statement of the*

specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

Now, in the case at hand the appellant was charged under section 130 (1) (a) of the SOSPA purporting to create the offence of rape; but as said earlier this provision is non-existent. Instead there is section 130 (1) which provides thus;

(1) It is an offence for a male person to rape a girl or a woman.

However, even if the appellant was to be charged under section 130 (1) of the SOSPA the prosecution ought to specify which category of rape he was facing. The categories of rape are provided under sub-section (2) of section 130 of the SOSPA which says that;

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(a) not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse;

(b) with her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention;

(c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by any drugs, matter or thing, administered to her by the man or by some other person unless proved that there was prior consent between the two;

(d) with her consent when the man knows that he is not her husband, and that her consent is given because she has been made to believe that he is another man to whom, she is, or believes herself to be, lawfully married;

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

Hence, for the type of the victim in the case at hand, the appropriate provision ought to have been section 130 (1) (2) (a) of the SOSPA.

Therefore, failure by the prosecution to cite the relevant provision of law which created the offence occasioned injustice to the appellant; as he could not appreciate the nature of the offence against him, so that he could properly marshal his defence. Faced with a similar situation in the case of **MATHAYO KINGU v. R,** Criminal Appeal No. 589 of 2015 (unreported) this Court had this to say;

".....the non-citation of proper provisions of the law specifying the type of rape and resulting sentence should the conviction be entered, prevented the appellant from appreciating not only what form of defence he should marshal, but the

important elements of which type of the offence of rape he was going to face."

Similarly, scoring the importance of the charge to specify category of the offence, in the case of **JOSEPH PAUL @ MIWELA v. R,** Criminal Appeal No. 379 of 2016 (unreported) this Court said;

"We wish to emphasize that since each category of rape has its own ingredients and peculiarities, it is of the highest significance that the specific category of that offence charged be clearly disclosed in the statement of offence."

With the foregoing discussion, it is clear that the State Attorney was not correct when she insisted that the part of the charge creating the offence of rape was properly framed.

Now, with what we have shown herein, we have no doubt in mind that the charge that was laid down at the appellant's door was incurably defective. This position of law has been held in various decisions of this Court; few of those are; **MUSSA MWAIKUNDA v. R** [2006] T.L.R 387; **ISIDORE PATRICE v. R,** Criminal Appeal No. 224 of 2007;

RAMADHANI JUMANNE v. R, Criminal Appeal No. 587 of 2015 and **MAYALA NJIGAILELE v. R,** Criminal Appeal No. 490 of 2015 (all unreported

Moreover, as rightly submitted by Ms Hyera the sentencing provision of law was not proper as the victim of the offence was aged 72 years. In that case the proper provision ought to be section 131 (1) of the SOSPA which provides for punishment of rape to be thirty (30) years imprisonment. Hence, had it been the only anomaly, we would have said it could be cured under section 388 of the CPA, because the appellant was sentenced to thirty (30) years imprisonment. Therefore, the first ground of appeal succeeds and we allow it.

The foregoing conclusion would have been enough to dispose of the appeal, but nevertheless, we have decided to deliberate the second ground of appeal argued by the State Attorney. This Court has in many instances stated the legal principles regarding evidence of visual identification. These include; **one,** such evidence is of the weakest kind and most unreliable and should be acted upon cautiously after the court is satisfied that the evidence is watertight, and all possibilities of mistaken identity are

eliminated. **Two,** even if it is evidence of recognition that evidence must be watertight. In that regard, where the offence is committed at night, and the question of light is in issue, there must be clear evidence as to the intensity of the said light and that bare assertions, would not do. **Three,** in matters of identification, conditions for identification alone, however ideal they may appear are no guarantee for untruthful evidence. (See **MAGWISHA MZEE & ANOTHER v. R,** Criminal Appeal No. 465 and 467 of 2007; **SHADRACK KUHAHA v. R,** Criminal Appeal No. 139 of 2015; **MOHAMED SHABANI v. R,** Criminal Appeal No. 41 of 2009; **JOHN JACOB v. R,** Criminal Appeal No. 92 of 2009; **DANIEL s/o PAUL @ MEJA v. R,** Criminal Appeal No. 307 of 2016 and **HAMISI HUSSEIN & OTHERS v. R,** Criminal Appeal No. 86 of 2009 (all unreported).

In the case at hand, the complainant, PW1 evidenced that soon after the invasion the assailant put off the lamp light before he raped her. Therefore, there was no any source of light at the scene upon which PW1 could have identified her assailant. Even though, PW1 said she identified the assailant as the appellant herein because she knew him before. This Court is in agreement with the learned State Attorney that, in the absence

of any source of light, she could not correctly identify him to be her assailant.

That is why this Court said in the case of **HAMISI HUSSEIN v. R** (supra) that;

> *"We wish to stress that even in recognition cases when such evidence may be more reliable than identification of a stranger, clear evidence on sources of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."*

Therefore, although PW1, who was the only eye witness, said that, the appellant is her relative and neighbour, since the conditions were not conducive for correct identification, it cannot be said that she positively recognized him to be her rapist.

For what we have shown above, we are settled in mind that, the appellant was not identified at the scene to be PW1's rapist. Thus, the second ground of appeal has merit and we allow it.

Finally, we find this appeal meritorious and accordingly allow it. The conviction against the appellant is thus quashed and the sentence and order of compensation to the complainant are hereby set aside. As a result the appellant shall be released from prison forthwith unless he is otherwise lawfully held.

DATED at **ARUSHA** this 2nd day of October, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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

B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL