IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA
(CORAM: MUSSA, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 307 OF 2016

DANIEL S/O PAUL @ MEJA ..... APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha

(Moshi, J.)

Dated 15th day of January, 2016
In
Criminal Appeal No. 42 of 2015

JUDGMENT OF THE COURT

1st & 9th March, 2018

MWARIJA, J.A.

The appellant, Daniel Paul, @ Meja was charged in the Resident Magistrate's Court of Arusha with the offence of rape contrary to section 130(2)(e) and 131(1) of the Penal Code [Cap 16 R.E. 2002]. It was the prosecution's case, built on the evidence of seven witnesses, that on 27/10/2012 at Mirongoine Village, within Arumeru District in Arusha region, the appellant did have a carnal knowledge of Bahati Saigilo, a girl aged 12 years.

According to her evidence, the victim of rape, Bahati Saigilo who testified as PW2, on 26/10/2012 at about 8:00 p.m, she retired to bed with

her younger brother, Fredy Saigilo (PW4) and a neighbour's child, Caroline Maliaki (PW5) who were at the material time aged 9 and 6 years respectively. On that night, the parents of PW2 and PW4 were away from home. While the trio were asleep in the bedroom, a culprit broke one of the windows of the house at the sitting room and went in the bedroom where PW2 and the other children (PW4 and PW5) were sleeping. On what appeared to be the intention of breaking into the house, the intruder molested PW2 by raping her. As a result of the rape, PW2 suffered pain due to a serious injury which was occasioned to her. According to the medical officer who examined her, Dr. Alphone Samwel Chugulu (PW8), the posterior part of PW2's vagina was ruptured causing her to bleed profusely.

Following the incident, PW2 woke up and shouted for help. PW4 and PW5 joined her in sounding an alarm. It was then that the neighbours who included Zaituni Juma (PW7), the mother of PW5, arrived at the scene. The culprit had however, already fled the scene but according to PW7, she saw him before he disappeared. She proceeded to examine PW2 who was bleeding and upon finding that she was seriously injured, she went with her to (PW7's) home. They stayed there and in the morning,

she took her to dispensary for treatment. Due to the nature of the injury however, PW2 was referred to Mt. Meru Hospital where she was admitted for six days for further treatment that included the stitching of the ruptured part of her private parts.

As stated above, it was the prosecution's case that the offence was committed by the appellant. It relied on identification evidence of PW2, PW4 and PW5 who testified that they indentified the appellant in the bedroom and PW7 who deponed that she identified him when she went to the scene and saw him running away.

In his defence, the appellant denied the charge. He disputed the evidence of the prosecution witnesses who contended that they identified him at the scene. He raised a defence of *alibi;* that on 26/10/2012 he went to Korongoni area where he stayed until on 27/10/2012 in the afternoon when he returned to his home. He said that he was informed about the incident by his wife after his return from Korongoni. He also challenged the credibility of the prosecution evidence stating that the evidence was in variance with the charge. According to him, whereas the charge sheet alleges that the offence was committed on 26/10/2012, the

evidence shows that PW2 was taken to hospital on 27/10/2012. He also alleged existence of misunderstandings between him and PW2's family which resulted into the act by the said family, of filing cases against him in 1994.

Having heard the prosecution and the defence evidence, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt. The learned trial Resident Magistrate was of the view that the appellant was properly identified on the material night by PW2, PW4, PW5 and PW7 by aid of moonlight. She thus found the appellant guilty and consequently convicted and sentenced him to 30 years imprisonment. He was also ordered to pay Shs. 500,000/= as compensation to the victim of rape (PW2).

The appellant was aggrieved by the decision of the trial court and therefore appealed to the High Court. His appeal was unsuccessful hence this second appeal.

At the hearing of the appeal, the appellant was represented by Mr. Leonard Buhoma, learned counsel whereas the respondent Republic was

represented by Ms Eliainenyi Njiro, learned Senior State Attorney. In arguing the appeal, Mr. Buhoma adopted the memorandum of appeal filed by the appellant. In the memorandum, the appellant had raised five grounds of appeal but the learned counsel decided to argue the first ground only. He abandoned the other grounds as well as the additional ground which he had raised in his supplementary memorandum of appeal. The appellant's first ground of appeal which was argued by Mr. Buhoma states as follows:

> *"That, both the trial court and the first appellate court erred in law and in fact when they failed to scrutinize the evidence on record as to the identification of the appellant since PW1 testified to the effect that there was moonlight which she used to identify the appellant hence the identification was very weak and not watertight".*

Submitting in support of that ground of appeal, Mr. Buhoma argued that since the offence was committed at night hence under difficult conditions of identification, the evidence of the prosecution witnesses that they identified the appellant was not, under the circumstances stated by

the witnesses, reliable. He contended that the evidence by the witnesses that they identified the appellant through the aid of moonlight is not credible because, firstly, the offence was committed in the bedroom while the moonlight relied upon by PW2, PW4 and PW5 was through the sitting room's window and secondly that the intensity of the moonlight was not described.

The learned counsel stressed that under the circumstances, the evidence of identification was insufficient to found the appellant's conviction. Relying on the case of **Amani Waziri v. Republic** [1980] TLR 250, Mr. Buhoma submitted that the evidence which was acted upon by the trial court was weak and unreliable.

On her part, Ms Njiro informed the Court at the outset, that the Republic was supporting the appeal. She agreed with the appellant's counsel that the evidence of identification relied upon by the prosecution is not watertight. According to the learned Senior State Attorney, the contention by PW2, PW4 and PW5 that the appellant was identified by them in the bedroom through moonlight is highly doubtful. This is because, according to the sketch plan (Exh. P1) tendered by No. D 9797

D/C Elishilia the window was at the sitting room. She added that the prosecution evidence had another serious shortfall, that the witnesses did not describe the intensity of the moonlight. She said that this applies also to the evidence of PW7 who stated that she saw the appellant at the scene of crime running away.

Ms Njiro submitted further that PW7 did not state the distance from which she observed the appellant. On the evidence of PW5 that she heard PW2 asking Paulo as to why he was raping her, the learned Senior State Attorney submitted that such evidence is unreliable because the name of the appellant is Daniel, not Paulo.

From the submissions made by the learned counsel for the appellant and the learned Senior State Attorney, we agree that the visual identification evidence of PW2, PW4, PW5 and PW7 is central to the determination of the appeal. Having examined the evidence on record and the parties' submissions we agree that the prosecution evidence depended mostly on the identification evidence. It is trite law that evidence of identification is of weakest kind and unreliable such that the same should not be acted upon unless all the possibilities of a mistaken identity have

been eliminated. In the case of **Demeritus John @ Kajuli & 3 others v. The Republic,** Criminal Appeal No. 155 of 2013 (unreported), the Court stated as follows on that position:

> *" In a string of decisions, the Court has stated that evidence of visual identification is not only of the weakest kind, but it is also most unreliable and a court should not act on it unless all possibilities of mistaken identity are eliminated and it is satisfied that the evidence before it is absolutely water-tight.* ***(See Waziri Amani v.*** **Republic.** *[1980] TLR 250;* ***Raymond Francis v.*** **Republic** *[1994] TLR 100;* **Republic** ***v. Eria Sebatwo*** *[1960] EA 174;* ***Igola Iguna and Nori @ Dindai Mabina v.*** **Republic;** *Criminal Appeal No. 34 of 2001 (CAT, unreported).... It is most essential for the court to examine closely whether or not the conditions of identification are favourable and to exclude all possibilities of mistaken identification."*

Applying the above stated test to the evidence of PW2, PW4 and PW5, we agree with both Mr. Buhoma and Ms Njiro that the identification evidence of the witnesses mentioned above is not watertight. Firstly, they did not describe the intensity of the moonlight and secondly, although the appellant was not a stranger to them, it is beyond comprehension that

from Exh P1, moonlight from a window at the sitting room could be bright enough to enable them to recognize the culprit in the bedroom. This is so notwithstanding the fact that the door to that room was open and the moonlight was *"shining a lot"* as stated by PW2. It is hard to believe that she could have determined the intensity of the moonlight while she was inside the house.

Similarly, although PW7 had known the appellant before the date of incident, her evidence could not be reliable unless she described the intensity of the moonlight. This is because the requirement applies also to the evidence of recognition. In the case of **Hamis Hussein & Others v. Republic,** Criminal Appeal No. 86 of 2009 (unreported), the Court stated as follows:-

> *"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 whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made ."*

See also the case of **Rashid Seba v Republic** Criminal Appeal No. 95 of 2005 (unreported).

The evidence of PW7 was also short of description of the distance between her and the culprit who was running from the scene. The distance which she described to be seven feet was between her house and that of PW3 in which the offence was committed. She stated as follows:

> *"From my house to the material place, after saw you (sic) only about 7 foot (sic)* ***that remained to reach there."***
> [Emphasis added]

In upholding the appellant's conviction, the High Court relied also on the evidence of PW4 who testified that he heard PW2 mentioning Paulo as the person who was raping her. In her evidence however, PW2 kept on referring the appellant by the name of Meja meaning that he knew him by that name. The evidence of the PW4 on that aspect is therefore doubtful, more so because PW2's evidence does not show that he made that statement.

On the basis of the above stated shortfalls in the prosecution evidence, we agree with the parties' submissions that the case against the appellant was not proved beyond reasonable doubt. We therefore hereby allow the appeal. As a result, the judgments of the two courts below are hereby quashed and the appellant's conviction is set aside. He shall be released from prison forthwith unless he is otherwise lawfully held.

DATED at **DAR ES SALAAM** this 8th day of March, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL