IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

CRIMINAL APPEAL NO. 182 OF 2017

(CORAM: JUMA, C.J., MWARIJA, J.A., And MZIRAY, J.A.)

FRANK CHRISTOPHER @ MALYA ..... APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

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

(Mohamed,J.)

dated the 5th day of April, 2017
in
Criminal Appeal No. 117 of 2016

JUDGMENT OF THE COURT

4th & 10th July, 2018

MWARIJA, J.A:

In the District Court of Singida at Singida, the appellant, Frank Christopher @ Malya was charged with the offence of rape contrary to section 130(1) 2(e) and 131(1) of the Penal Code [Cap. 16 RE.2002]. It was alleged that on 30/3/2016 at 10.00 hrs at Itungukia area in Minga ward within the district and region of Singida, the appellant did have sexual intercourse with one R P, a girl aged twelve years. The appellant denied the charge.

After a full trial, the trial court found the appellant guilty and consequently sentenced him to thirty years imprisonment. Having been dissatisfied with the decision of the trial court, the appellant unsuccessfully appeal to the High Court hence this second appeal.

The facts giving rise to the appeal are not complicated. On 30/3/2016, R P, a primary school student, who was at the material time aged 12 years, was going for her tuition class. She disembarked from a commuter bus (daladala). While walking, she notice a person following her. That person passed her and after a short distance, he stood under a tree. He called her and after asking her name and her place of residence, the questions which she answered, he started accusing her of having stolen a mobile phone from a certain old man in the bus in which she was travelling. He requested her to go with him to that old man. She heeded and walked with him. On the way, he was pretending to be talking through his mobile phone with a certain "Afande". After walking for a certain distance, they arrived in a maize field where she was told to sit down. As she obeyed, that person required her to lie on the ground. He pushed her down,

removed her sweater and used it to cover her face. He then pulled down his trouser, undressed the girl's under wear and while threatening her with a pocket knife so that she did not make noise, he raped her.

When that person left, she ran to the road where she found a certain woman sitting outside her house. The victim who was crying narrated to that woman what had happened. The victim who testified at the trial as PW1, was later taken to Ipembe Police Station where she found her mother (PW2) as she had been informed of the incident through a phone. The matter was referred to Central Police Station, Singida where PW1 was issued with a PF 3 and consequently taken to hospital for medical examination and treatment.

Nine days later, on 9/4/2016 Pw1 saw the appellant coming out the house near her aunt's residence. She informed her aunt, Happyness Kizaga (PW3) about the appellant as being the person who raped her. PW3 in turn informed PW2 who reported to the police. Upon the report, the appellant was arrested and charged.

At the trial, the prosecution relied on the evidence of five witnesses including PW1, PW2 and PW3. In their evidence, PW2 and PW3 gave an account of what took place after the incident, including how they assisted to effect the appellant's arrest. Other witnesses are Dr. Bakari Martin Mishole (PW4) who examined PW1 and filled in the PF.3 and WP 7847 D/C Stella, the investigating officer. In his evidence, PW4 testified that after having examined PW1, he found injuries and blood clots in her vagina. He concluded that she was raped as shown in the medical report (Exh.PI). On her part, PW5 testified that after the incident had been reported, she was assigned to carry out investigation. It was while investigation was going on that she was informed of the appellant's arrest.

In its decision, the trial court found that the prosecution had proved its case beyond reasonable doubt. The learned trial Senior Resident Magistrate was satisfied that the appellant was properly identified by PW1. The trial court considered the fact that the offence took place in the day and that before he committed the offence, the

culprit who raped PW1 walked with her for a reasonable distance at close range and that in such circumstances, she had enough time to have him under observation, the fact which, in the learned trial magistrates view, made the culprit to be not a stranger to PW1. In the circumstances, the trial magistrate found that the conditions stated in the case of **Waziri Amani v The Republic** [1980] TLR 250 were met. She then convicted and sentenced the appellant as stated above.

As indicated above, the appellant unsuccessfully appealed to the High Court. The learned first appellate judge upheld the trial court's finding. He found *inter alia* that, the appellant was properly identified.

The appellant's memorandum of appeal consists of 5 grounds as follows:-

> *(1) That, your honor Justice of appeal the 1st appellate court erred and the trial court erred in law and fact when wrongly received the evidence of PW1 without followed the requirement of section 127(2) of the evidence Act Cap 6 R.E.2002 on the reasons*

that the said test examination does not show in detail how it conducted.

(i) it is the requirement of the law that the court at least ought to have recorded its opinion on as to whether the witness had sufficient intelligence; and (2) whether the witness understood the duty of speaking the truth the case at hand lack such requirement .

(2) That, you honor Justice of appeal the 1st appellate court erred and the trial court erred in law and fact when did not consider that the evidence of visual identification was too weak to ground conviction as it was well corroborated by PW2 that the victim was raped by known person.

(3) That, your honor justice of appeal since the identifications was in a weak kind there are was a need to conduct an identification

pared so as to clear the doubts of identification since the appellant was arrested after the time to have been passed and there is no evidence as to whether PW1 knew the appellant before incident.

(4) *That, your honor justice of appeal the 1st appellate court and the trial court erred in law and fact acted on the Evidence of PW4 which was not securitizing properly.*

(5) *That, your honour justice the trial Court and the 1st appellate court erred in law and fact when did not consider my defense acted only by the prosecution case.*

At the hearing of the appeal, the appellant was represented by Mr. Godfrey Wasonga, learned counsel. On its part, the respondent Republic was represented by Ms Beatrice Nsana, learned State Attorney.

In his submission in support of the appeal, Mr. Wasonga decided to argue the grounds concerning the weight of identification

evidence as raised in grounds 2 and 3. He added another ground challenging the procedure used in the admission of the PF.3 (Exh. PI).

On the identification evidence, the learned counsel argued that the High Court erred in failing to find that such evidence should not have been acted upon because PW1 did not, prior to the appellant's arrest, give description of the person who raped her. This, he said, was important because according to her evidence, she did not know him before. Mr. Wasonga argued that, in the circumstances, her evidence should have been corroborated. He cited the case of **Africa Mwambogo v. Republic** [1984] TLR 240 to support his argument. He submitted that the evidence of PW2 and PW3 had nothing do to with identification of the appellant because both of them testified on matters relating to the aftermath of the incident.

On the procedural irregularity, Mr. Wasonga argued that since the incident took place on 30/3/3016 and the medical report (Exh PI) is shown to have been admitted in court on 3/3/2016, that documentary evidence is invalid and should thus be disregarded.

Responding to the submission of the appellant's counsel, Ms Nsana started by supporting the appellant's conviction. With regard to identification evidence, relying on the conditions of identification as stated by both the trial court and the High Court, she submitted that the appellant was properly identified. According to the learned State Attorney, the conditions stated in the case of **Waziri Amani** (supra) were met. She added that PW1 described the person who raped her as being tall, and that he had, at the material time of the offence, put on black jeans trousers and T-shirt with black and blue strips. When her attention was drawn to the fact that the description was given by the witness at the hearing after the appellant had been arrested and charged, Ms Nsana conceded that the account does not amount to prior description.

With regard to Exh PI, Ms Nsana submitted that the date of admission by the trial court of the medical report was inadvertently shown. That, she said, is a mere slip which does not affect the validity of the exhibit.

We have duly considered the submissions of the learned counsel for the appellant and the learned State Attorney. As has been shown above, the appellant's conviction was mainly based on the identification evidence of PW1. Mr. Wasonga has strenuously challenged that evidence on the ground that it is deficient for failure to meet the condition that there should have been a prior description of the identified person before such evidence was acted upon to found the appellant's conviction. We agree with the learned counsel. As stated in the **Waziri Amani Case** (supra).

> " *No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is water tight. The following factors have to be taken into consideration; The time the witness had the accused under observation, the distance at which he observed him, the condition in which such observation occurred, for instance whether it was day or night, (whether it was dark if*

so, was there moon light or hurricane lamp etc), ***whether the witness knew or had seen the accused before or not"*** [Emphasis added].

The learned High Court judge was of the view that the appellant was properly identified. He stated as follows:-

"...the incident occurred at around 10.00 hours in the morning in broad daylight. The victim was able to observe her revisher for a considerable length of time as they conversed while walking and they were in close proximity. I am content she was thereby able to recognize him again when she saw him on 9/4/2016 coming out of Sarah's house."

It is a correct position that the offence took place under the circumstances stated above. With respect however, in her evidence PW1 did not say anything as regards the description of the person who raped her. It is such description which is necessary to eliminate

the possibility of a mistaken identify. This is more so because, PW1 saw the person who raped her for the first time on the material date.

It is trite law that in order to act on the evidence of identification of a stranger, the witness must have given first, the description of that person. The principle was stated in the case of **R.v Mohamed B. Allui** [1942] 9 EACA 72 in the following words:-

> *" that in every case in which there is a question as to the identity of the accused, the fact of there having been given a description and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all, of course by the person who gave the description, or purports to identify the accused and then by the person to whom the description was given."*

Relying on that principle, the Court stated as follows in the case of **Cosmas Chaula v The Republic,** Criminal Appeal No. 6 of 2010 (unreported):-

" we are of the view that there is no doubt that the matter took place at day time. But, the question is who did the act to PW1? As the record shows, the trial court and the first appellate court relied on the evidence of PW3 to prove that the appellant was identified at the scene of crime. However, it is now settled that a witness who alleges to have identified a suspect at the scene of crime ought to give a detailed description of such a suspect to a person whom he first report the matter to him/her before such a suspect is arrested. The description should be on the attire worn by a suspect, his appearance, height, colour and/or any special mark on the body of such a suspect."

Given the above stated deficiency in the identification evidence of PW1, we are of the decided opinion that it was not safe to act on that evidence to found the appellant's conviction. We find that the

possibility of a mistaken identity was not eliminated. The finding on that ground suffices to dispose of the appeal.

In the event, the appeal is hereby allowed. The appellant's conviction is quashed and the sentence is set aside. He shall be released from prison unless he is otherwise held.

DATED at **DODOMA** this 7th day of July, 2018.

I.H. JUMA
CHIEF JUSTICE

A.G.MWARIJA
JUSTICE OF APPEAL

R.E. MZIRAY
JUSTICE OF APPEAL

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

S.J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL