IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MZIRAY, J.A., MWANDAMBO, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 231 OF 2009

HAMIS HALFAN DAUDA ....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mihayo, J.)

dated the 27th day of April, 2009
in
Criminal Appeal No. 55 of 2008

JUDGMENT OF THE COURT

26th March & 9th April, 2020

MZIRAY, J.A.:

The appellant herein, Hamis Halfan Dauda, is challenging the decision of the High Court (Mihayo, J.) which upheld the conviction and sentence against him on a charge of rape. We have deemed it prudent at the outset, to observe that, the charge sheet, is not included in the record of appeal. We are informed that the same got lost and all efforts to trace it was unsuccessful.

Nonetheless, from the trial court's judgment and that of the first appellate court we have been able to discern that the appellant together with one Omari Waziri who is not a party to this appeal were jointly arraigned for rape offence in the Resident Magistrate's Court of Dar es Salaam at Kisutu contrary to sections 130(1), (e) and 131(1) of the Penal Code [Cap. 16 R.E. 2002], as amended by the Sexual Offences Special Provision Act No. 4 of 1998.

After a full trial, the appellant was found guilty of rape, in which he was convicted and sentenced to serve thirty (30) years term in jail. The conviction and sentence did not amuse the appellant. His first appeal to the High Court failed, hence this second appeal.

It was alleged by the prosecution that the incident occurred on 17.4.2005 at about 04.00hrs at Mbezi Beach area within Kinondoni District where the victim was from Mateo Club. She was grabbed by the appellant together with other people and raped. After the incident, the victim reported the ordeal to police and named the appellant as the culprit. The appellant was arrested in connection with the alleged offence and subsequently charged in the trial court.

In his defence at the trial, the appellant denied involvement in the commission of the offence. On the basis of evidence adduced, the trial magistrate was satisfied that the case against the appellant had been proved to the required standard. Consequently, as already stated, the appellant was duly convicted and sentenced to a term of thirty years imprisonment.

On his first appeal in the High Court, the learned judge (Mihayo,J.) was settled in his mind that the appeal was without merit. The appeal was dismissed in its entirety.

In this appeal, the respondent/Republic had the services of Mr. Credo Rugaju, learned Senior State Attorney along with Ms. Rachel Balilemwa learned State Attorney. The appellant was unrepresented and so he fended for himself. The appellant filed a memorandum of appeal consisting of thirteen (13) grounds of complaint. He adopted these grounds and opted to hear the respondent's version after which he would rejoin if need arose.

It was Mr. Rugaju, who submitted for the respondent. At the outset, he informed the Court that the charge sheet is missing in the record of appeal. He submitted that the charge sheet is the one which initiates

criminal proceedings. He said, in the absence of the charge sheet on record, it is difficult to ascertain the appellant's complaints in a wider spectrum as to whether the same are genuine or not. On the basis of that accord, the learned Senior State Attorney urged the Court to invoke its power under section 4(2) of the Appellate Jurisdiction Act, Cap. 33, R.E. 2002 (AJA) to strike out the appeal.

In opposing the appeal, the learned Senior State Attorney submitted that in the instant case, the appeal is without merit because there is enough evidence to sustain the appellant's conviction. He relied on the testimony of PW1, the victim of the alleged rape. He said that her evidence was loud and clear that PW1 was raped by the appellant in the bush on her way from a club on the night of 17.4.2005. He pointed out that PW1 after having been raped, she reported the incident to the police and named the appellant as the culprit. Her testimony is corroborated by PW3 who explained how the appellant took the victim to the bush and raped her. On that basis, the learned Senior State Attorney maintained that the prosecution proved the case beyond reasonable doubt and that the evidence of PW1 and PW3 was sufficient in the circumstances to ground a

conviction.

In rejoinder, the appellant insisted that he did not commit the alleged offence and that the evidence of identification was not watertight to ground a conviction.

We have given due consideration to the grounds of appeal raised and the rival arguments of the parties to this appeal. We think that from the totality of the thirteen grounds of appeal lodged, only one issue raises an important legal point for determination in this appeal. The issue is whether both the High Court and the trial court erred in fact and law to convict the appellant relying on the evidence of PW1 and PW3 which was insufficient to prove the offence charged beyond reasonable doubt.

It is pertinent to mention at this stage that this is a second appeal and that in a second appeal the Court confines itself to the determination of matters of law. But there are circumstances where the Court can on a second appeal like the present one, venture into concurrent findings of facts by two courts below for the purpose of satisfying itself on the correctness of such findings. As this Court restated in **Julius Ndahani v. R,** Criminal Appeal No. 215 of 2004 (unreported), the Court can interfere

with concurrent findings of facts by the courts below if there is a misdirection or non- direction on matters of facts by the courts below. See also the cases of **Musa Mwaikunda v. R** [2006] T.L.R. 387 and **Salum Mhando v. R** [1993] T.L.R. 170. We are going to apply the principle enunciated in the above authorities to guide us in arriving at the determination of this instant appeal.

We note that, the appellant was convicted of the offence under section 130 (1) (2)(e) and section 131 (1) of the Penal Code which is in respect of a child under 18 years while in actual fact, the victim was above 18 years. In terms of section 135(a)(ii) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (CPA) a statement of offence ought to describe the offence and should contain a **reference to the section of the enactment creating the offence.** As the appellant's conviction was not in compliance with the law, that was irregular. The appellant is taken to have been prejudiced and the defect cannot be cured under section 388(1) of the CPA. (See **Michael Luhiyo v. R** (1994) TLR 181 and **Kobelo Mwaha v. R** Criminal Appeal No. 173 of 2008 (unreported). This point alone would have been sufficient to dispose the appeal. However, assuming that the

charge sheet was in order, was the evidence adduced sufficient to ground a conviction? The submission of the learned Senior State Attorney tend to suggest that the case for the Prosecution was proved beyond reasonable doubt. Due to the position taken by the Prosecution, we think there is a need to look at the evidence whether it was sufficient to ground a conviction.

In this case after an objective evaluation of the evidence on record, the grounds of appeal raised and the the oral submissions made from both parties, with respect, we fail to agree with the learned Senior State Attorney in opposing the appeal, and on the contrary we are of the considered view that there are good reasons to interfere with the findings of the courts below. We say so because from the evidence on record, the only evidence which implicated the appellant with the charged offence was that of the victim (PW1) and PW3. The evidence of PW1 only states that she was raped by the appellant at night when she was from a club and after having been raped, she reported the incident to the police and named the appellant as the culprit as submitted by the learned Senior State Attorney. On the other hand, the record is very clear at page 5 that PW1

was raped by a group of people whom he did not know their names. She only knew them by face. The relevant portion of PW1's evidence at page 5 reads: -

> *"I was attacked by ten people. After they attacked me, they took me to the banana plant/farm. They started raping me. Hamis started to rape me. He did sex me two times. The other people out of 10 also raped me but I do not know their names. I can identify their faced [sic]. Hamis is here in court."*

From the foregoing, it appears that the offence committed was gang rape and not rape as alleged. In considering PWI evidence, the appellant was charged and convicted on the basis of a defective charge sheet which preferred the offence of rape instead of gang rape.

Additionally, we are not also certain if the appellant was named to police after the incident. We say so because PW1 in her testimony was certain. She said that, she did not know the names of the culprits. As the incident occurred at night to which identification was at issue, naming the

appellant correctly by the victim at the earliest possible opportunity was an important assurance that indeed the victim identified the culprit at the scene. In the case of **Minani Evarist v. Republic**, Criminal Appeal No. 124 of 2007 (unreported) this Court quoting its earlier unreported decision in **Swalehe Kalonga & Another v. Republic**, Criminal Appeal No. 45 of 2001, stated:

> *"... the ability of a witness to name a suspect at the earliest possible opportunity is an all-important assurance of his reliability."*

We took the same position in our earlier decisions of **Jaribu Abdallah v. Republic** [2003] TLR 271 and **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39. In **Marwa Wangiti Mwita** (supra), we observed:

> *"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry".*

[See also: **Mafuru Manyama & Two Others v. Republic**, Criminal Appeal No. 256 of 2007, **Kenedy Ivan v. Republic**, Criminal Appeal No. 178 of 2007, **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1999 and **Yohana Dionizi & Shija Simon v. Republic**, Criminal Appeals No. 114 and 115 of 2009 (all unreported).

As we observed earlier, there is doubt if the victim (PW1) named the appellant as the culprit of the alleged rape immediately after reporting the incident to police. This is for the obvious reason that when testifying she told the trial court that she did not know the names of the culprits. As she did not know the names of the culprits, we wonder, why she named the appellant as a culprit. This, for us creates doubt. Apart from that, the incident happened at night on which the conditions at the scene of crime were not ideal for a correct identification. In the case of **Raymond Francis v. R,** Criminal Appeal No. 162 of 1993 (unreported) this Court, citing the case of **Mohamed Alhui v. Rex** (1942) 9 EACA 72, and speaking through Lubuva, J.A., stated: -

"...it is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance."

Also, in the celebrated case of **Waziri Amani v. R** [1980] TLR 250 this Court stated that visual identification is the weakest kind of evidence and the most unreliable, and that a court should not act on it unless all the possibilities of mistaken identity are eliminated.

In the present case, it is undisputed that the incident happened at night. In such circumstances, the evidence of PW1 has to be treated with great caution in order to ensure that such evidence is watertight. Looking at the evidence from the record, PW1 did not tell how she managed to see and identify the ravisher as being the appellant. She did not explain the source and extent of light at the scene. This, fall short of the emphasis given in **Masana Marwa v. Republic**, Criminal Appeal No. 229 of 2012, **Raymond Francis v. Republic** (supra) and **Rajabu Issa Ngure v. Republic**, Criminal Appeal No. 164 of 2013, (all unreported).

On the basis of the foregoing, the evidence of identification was not watertight. The same was not enough to ground a conviction. We are alive

however to the settled position of law that best evidence in sexual offences comes from the victim, but such evidence should not be accepted and believed wholesale. The reliability of such witness should also be considered so as to avoid the danger of untruthful victims utilizing the opportunity to unjustifiably incriminate the otherwise innocent person(s). In such cases, therefore, the victim's evidence should be considered and treated with great care and caution. It should be subjected and considered in the backdrop of the principles we have endeavoured to explain above. We have applied such principles in our present case and we find it apparent that the victim's evidence is wanting in terms of providing an impeccable explanation that it was the appellant who committed the offence.

It is for the above reasons that we are of the strong view that in the absence of positive evidence of identification the appellant was entitled to the benefit of doubt.

In the event, we hold that there was no iota of evidence to prove that the appellant committed the offence. Looking at the evidence as a whole, we must say, with respect, that the prosecution did not prove the

offence to the required standard. As such, there is good reason to fault the concurrent findings of the two courts below.

In the result, this appeal succeeds and, accordingly, the conviction and the sentence are quashed and set aside. We order the immediate release of the appellant unless he is held for other lawful cause.

DATED at **DAR ES SALAAM** this 3rd day of April, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 9th day of April, 2020 in the presence of the appellant in person and Ms. Violeth David, Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

E.G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL