IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 7 OF 2020

SWIZAN ROBERT @ KELLA MPUNGA.....APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court at Kisutu)

(Fovo, SRM Ext. Jur.)

dated the 20th day of November, 2019
in
DC Criminal Appeal No. 22 of 2019
.....

JUDGMENT OF THE COURT

26th October & 9th November, 2021

KIHWELO, J.A.:

The appellant was arraigned in the District Court of Temeke at Temeke in Dar es Salaam Region for the offence of rape contrary to section 130 (1) (2) (e) and 131 (1) of the Penal Code [Cap. 16 R.E 2002] (now R.E 2019). It was alleged that on 8th August, 2015 at night time at Police Ufundi area within Temeke District in Dar es Salaam Region, the appellant, did have carnal knowledge of a girl aged 15 years, who we shall henceforth identify her as PW1, for purposes of concealing her identity.

The trial court upon hearing the prosecution and the defence, believed the prosecution's version that the case against the appellant was proved to the hilt. Accordingly, the trial court found the appellant guilty as charged, convicted him and subsequently sentenced him to serve 30 years imprisonment.

In protesting his innocence, the appellant filed his first appeal in the High Court in Criminal Appeal No. 93 of 2019 which was later transferred to a Resident Magistrate upon whom extended jurisdiction was granted and was registered as DC Criminal Appeal No. 22 of 2019 which after hearing on merit on 20th November, 2019 was dismissed. Undeterred, the appellant lodged this second appeal.

Before the trial court, the prosecution case was founded on the evidence of four (4) witnesses namely PW1, Patrick Elia Mkondya (PW2), WP 2669 Cpl. Elianawe (PW3) and Daniel Chilimo (PW4). On the adversary, the defence had the appellant as the lone witness.

It was the prosecution case that on 8th August, 2015 at around 04:00 hrs while PW1 was asleep the appellant and two others made violent intrusion into the house by breaking two doors in order to gain access into the house and upon entering the room where PW1 was sleeping, one of

them put clothes into PW1's mouth in order to prevent her from shouting, the second intruder raped PW1 while the third one stole one bicycle and a cooker. According to PW1 who was sleeping with the kids, he was able to identify the appellant using the light which was on and that the appellant was a familiar person to PW1 as he was always seen in the nearby street. After all was done, the bandits left PW1 outside the door of the house and went away following which PW1 woke up PW2, her uncle and after explaining what transpired the duo reported the matter to the police where they were given PF3 (exhibit P2) which enabled them to go to hospital for treatment where PW4, a Medical Officer at Temeke Hospital medically examined PW1 and filled exhibit P2. The medical examination report revealed that, neither bruises nor any sign of forced penetration were seen in PW1's vagina. Furthermore, the hymen was not intact. The appellant was apprehended the following day by PW2 following a tip and assistance from a neighbour one Thom. The investigation was conducted by PW3 who drew the sketch map of the scene of crime (exhibit P1) which indicated where the rape was committed.

In his sworn defence testimony, the appellant gallantly distanced himself from the accusations made against him by the prosecution. He said that on 8th August, 2015 while at home at Police Ufundi he was arrested by

one PC Thomas for no apparent reason and taken to PW2's house where he was harassed, tortured and later taken to the police station.

As hinted earlier on, at the height of the trial, it was found that, on the whole of the evidence, the prosecution case was proven to the hilt and therefore, the appellant was convicted and sentenced as stated above.

In this appeal before us, the appellant has amassed seven (7) grounds of grievance which, when closely examined, boil down to four major grounds:

1. *That, the first appellate court erred in upholding the appellant's conviction despite the fact that the identification of the appellant by PW1 was not watertight.*

2. *That, the first appellate court erred in upholding the appellant's conviction in the absence of proof of penetration.*

3. *That, the first appellate court erred in upholding the appellant's conviction despite the fact that exhibit P1 was irregularly admitted in evidence.*

4. *That, the first appellate court erred in upholding the appellant's conviction while the prosecution did not prove the case beyond reasonable doubt.*

At the hearing, before us, the appellant was fending for himself, unrepresented, whereas Ms. Jenipher Masue, learned Senior State Attorney assisted by Ms. Nura Manja, learned State Attorney stood for the respondent

Republic. The appellant fully adopted the memorandum of appeal but deferred its elaboration to a later stage after the submissions of the learned Senior State Attorney, if need would arise.

Ms. Manja, prefaced her submission by supporting the appeal. The learned State Attorney began by arguing the 1st and 3rd grounds of appeal which she preferred to argue them conjointly and her argument was that in the circumstances of the instant case, it cannot be said that there was sufficient visual identification given the fact that the incident occurred at night and that PW1 did not clearly state the source of the light and its intensity, as required by the law. Reliance was placed in the case of **Scapu John and Another v. Republic,** Criminal Appeal No. 197 of 2008. On the basis of the foregoing evidence, the learned State Attorney argued that, under the circumstances, it cannot be safely said that there could be no room for mistaken identity and therefore, she argued that, the 1st and the 3rd grounds have merit.

Moving to the 2nd ground of appeal, the learned State Attorney was fairly brief and submitted that, the prosecution did not prove that there was penetration. She contended that neither PW1 nor PW4 proved that there was penetration, and this is clearly demonstrated by exhibit P2 which indicated

that there was no evidence of forceful penetration as there were no bruises and that the hymen was not intact. When prompted by the Court on whether penetration is proved only by medical evidence, the learned Senior State Attorney who came in to clarify further, argued that penetration can also be proved by the evidence of the victim or any other witness apart from the medical evidence. She finally argued that, the 2nd ground has merit.

Arguing in support of the 4th ground of appeal Ms. Manja once again was fairly brief. She submitted that the sketch map of the scene of the crime exhibit P1 was not properly admitted. She went further to submit that, exhibit P1 was not read after it was cleared for admission and that, this is contrary to the well-established principle of the law which requires that every exhibit which is cleared for admission must be read over to enable the accused understand its contents. She therefore implored us to expunge exhibit P1 from the record. On the basis of that submission she argued that the 4th ground has merit.

Ms. Manja rounded up her submission by the 5th, 6th and 7th grounds of appeal and her argument was that the prosecution did not prove the case beyond reasonable doubt. She contended that, the evidence of PW1 who claimed to have identified the appellant was not watertight and furthermore

there was no proof of penetration and similarly, exhibit P1 was irregularly admitted and once expunged from the record it affects the weight of the prosecution's case. She therefore argued that, the totality of the above is that the prosecution did not prove the case beyond reasonable doubt.

Our first concern in this appeal is whether it had really been established that the circumstances of identification of the appellant were favourable for proper identification. Evaluating the evidence on record, we are respectfully of the view that the conditions of identification cannot be said to have been ideal as we shall explain. Unlike the first appellate court, we are further unable to assert, that when the offender and the victim know each other chances of mistaken identity becomes minimal. We are of the considered opinion, however, that we cannot safely discount the very real possibility of mistaken identity even where the victim and the assailant are familiar to each other as long as circumstances surrounding the identification are not favourable for proper identification. There is large body of case law in this area. In the case of **Philipo Rukaiza @ Kicheche Mbogo v. Republic,** Criminal Appeal No. 25 of 1994 (unreported) we stated that:

> *"The evidence in every case where visual identification is what is relied on must be subject to careful scrutiny, due regard being paid to all the prevailing conditions to see if in all the circumstances*

there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has dispelled. There could be mistake in identification notwithstanding the honest belief of an identifying witness."

Clearly, the law is perfectly settled that evidence of visual identification is the weakest kind and unreliable and the court should not rely on such evidence without warning itself of its fallibility. In **Felician Joseph v. Republic**, Criminal Appeal No. 152 of 2011 (unreported) the Court emphasized that:

"....visual and aural identification evidence, be that of a stranger or a previously known person, particularly one done under unfavourable conditions, such as at night, is of the weakest kind and unreliable. Such evidence should be approached with utmost circumspection. No court should act on such evidence unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is absolutely watertight."

Thus, as observed above, reliance on such evidence to convict an accused person should only be where all likelihood of mistaken identity is eliminated and when the court is satisfied that the evidence before it, is absolutely watertight. See for instance, **Shamir John v. Republic**, Criminal Appeal No. 166 of 2004 (unreported).

In the landmark case of **Waziri Amani v. Republic** (1980) TLR 250, the Court outlined factors that have to be considered when courts deliberate on identification evidence. These factors are such as; **One**, the time the witness had the accused under observation. **Two**, the distance at which the witness had the accused under observation. **Three**, if there was any light, then the source and intensity of such light; and **Four**, whether the witness knew the accused prior to the incident.

Corresponding observations were made in the decisions of this Court in **Afrika Mwambogo v. Republic** [1984] TLR 240, **Raymond Francis v. Republic** [1994] TLR 100, **August Mahiyo v. Republic** [1993] TLR 117, **Mohamed Musero v. Republic** [1993] 290, **Nyigoso Masolwa v. Republic** [1994] TLR 186 and **Marwa Wang'iti Mwita and Another v. Republic**, Criminal Appeal No. 6 of 1995 (unreported).

It is not insignificant to say that, reading the evidence on record in particular the evidence of PW1 the sole identifying witness, we are of the view that the conditions for proper identification undoubtedly were not favourable. The trial court found that the identification of the appellant by PW1 was proper in the circumstances of the case. However, looking at the record of appeal at page 11 and 12 PW1 story was that on 8th August, 2015 at around 4:00 hours, the appellant and two others stormed into PW1's home

and went into her room raped her and left with a bicycle and cooker. She went on to say that, she identified the appellant because she slept with children and the light was on. According to PW1, she further identified the appellant because he was someone familiar to her as he was often seen in the street.

The circumstances surrounding the identification as explained above leaves no room suggestive of the fact that PW1 favourably identified the appellant at the scene of the crime and this is particularly so when the question of the type of light and its intensity is concerned as these were not explained by PW1. The totality of these facts persuades us to hold that the identification of the appellant was not watertight to warrant the appellant's conviction. We are settled in our minds that matters at the trial court and the first appellate court were not as neatly tied up as they should have been otherwise they would not have come to the conclusions they arrived. In the circumstances, we find the 1st and 3rd grounds to have merit.

The above would have sufficed to dispose the appeal but, we are however, obliged to consider, albeit briefly, the 5th, 6th and 7th grounds of appeal that the prosecution did not prove the case beyond reasonable doubt. In **Woodmington v. DPP** (1935) AC 462, it was held inter alia that, it is a

duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. This is a universal standard in criminal trials and the duty never shifts to the accused.

The term beyond reasonable doubt is not statutorily defined but case laws have defined it. In the case of **Magendo Paul & Another v. Republic** (1993) TLR 219 the Court held that:

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."*

We hasten to state at this point that, in seeking to answer the question on whether the prosecution in the instant appeal proved the case beyond reasonable doubt, we think, this should not detain us much and the answer is not far-fetched. We have already discussed at considerable lengthy the weaknesses in the prosecution's case. The learned State Attorney was deniably right to argue that the prosecution did not prove the case beyond reasonable doubt. This is particularly clear from the evidence on record which revealed in no uncertain terms that PW1's identification of the appellant was not watertight and furthermore, there was no proof of penetration which is one of the critical elements in providing the offence of

rape. Neither the PF3 (exhibit P2) nor the victim (PW1) or any other witness proved penetration.

For all the foregoing reasons, we are satisfied that the two courts below misapprehended the evidence. We thus find that the appellant's conviction cannot be supported by the evidence on record. Accordingly, we allow the appeal, quash the conviction and set aside the 30 years prison sentence. We order the appellant's immediate release from prison unless he is otherwise lawfully detained.

DATED at **DAR ES SALAAM** this 5th day of November, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered on this 9th day of November, 2021, in the presence of the appellant Linked to the Court through video conference from Ukonga Prison and in the absence of the respondent/Republic dully served is hereby certified as a true copy of the original.

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL