IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: WAMBALI, J.A., LEVIRA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 440 OF 2017

MUSSA SAGUDA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Makani, J.)

Dated the 25th day of August, 2017
in
DC Criminal Appeal No. 42 of 2015

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JUDGMENT OF THE COURT

11th & 27th August, 2021

WAMBALI, J.A.:

The appellant, Mussa Saguda and Hussein Miraji (not a party in this appeal) were jointly and together charged before Kahama District Court with two counts, namely; Conspiracy to commit an offence and Armed Robbery contrary to sections 384 and 287A of the Penal Code, [CAP 16 R.E. 2002] [now R.E. 2019] (the Penal Code). In the first count it was alleged that both accused jointly and together on 27th June, 2012 at about 00;00hrs at Mbulu Village within Kahama District in Shinyanga Region did conspire to commit the offence of armed robbery.

It was further alleged with respect to the second count that on the same date and place named in the first count, the duo stole various items valued at TZS. 119,750.00 from one Bertha James and immediately before or after such stealing did use 'panga' to threaten her in order to obtain and retain the stolen property. It is noted as per the record of appeal that both denied the allegations levelled against them in the first and second counts.

On the other hand, the appellant was charged alone in the third count with the offence of rape contrary to sections 130 (1) (2) (a) and 131 of the Penal Code. The indictment in respect of this count was to the effect that on 27th June, 2012 at 00:00hrs at Mbulu Village within Kahama District in Shinyanga Region the appellant did have sexual intercourse to one Bertha James without her consent. Notably, the appellant pleaded not guilty.

To substantiate its case the prosecution side paraded seven witnesses, namely; Bertha James (PW1), INSP. Evaristo Kivuyo (PW2), Robert Michael (PW3), F. 2681 D/SGT Severin (PW5), D. 4790 D/CPL Fadhil (PW6) and Janeth Kang'ombe (PW7). In addition, the following exhibits, namely: PF3 of Bertha James;

Identification parade register; the cautioned statement of Hussein Miraji; two pangas, two trousers, "Maasai shuka", "Kofia" and torch; certificate of seizure and the cautioned statement of Mussa Saguda (the appellant) were tendered and admitted as exhibits, P1, P2, P3, P4, P5 and P6 respectively.

On the other side, the appellant and Hussein Miraji defended themselves as they did not summon witnesses to support their defence.

As it were, at the conclusion of the trial, the trial court found that the evidence of the prosecution proved that the appellant was guilty of the offence of rape and armed robbery as the substance of the evidence in respect of the said offences was not challenged by the appellant. On the contrary, it was found that the case against Miraji Hussein was not proved to the required standard.

Noteworthy, the trial court acquitted the appellant and Miraji Hussein of the offence of conspiracy to commit the offence.

Consequently, the appellant was sentenced to serve 30 years imprisonment in respect of each count. The sentences were to run concurrently.

Aggrieved, the appellant lodged an appeal to the High Court, which was unfortunately dismissed in its entirety, hence the instant appeal.

Before us the appellant presented the following grounds of appeal to contest the decision of the High Court: -

1. ***THAT,*** *the first appellate judge had wrongly entertained the appeal even after the original record and prosecutions documentary exhibits has been proved to be lost through affidavits from the Deputy Registrars of Shinyanga and Tabora as the High Court and this Court (CAT) the appellate tribunal cannot form some opinion as to the likehood (i.e. Documentary evidence) of its accuracy in (sic) thus unable to meet the ends of justice.*
2. ***THAT,*** *the trial and first appellate court erred in law and facts to rely on unfavourable visual identification.*
3. ***THAT,*** *the lower courts had wrongly relied on the identification parade which (sic) conducted contrary to the statutory requirements which are contained in the Police General Order (PGO) No. 232.*

4. ***THAT,*** *the lower courts erred in law and facts to rely on manufactured familiarity claims (disputed) as the sole basis for identification and in (sic) thus failed to analyse the identification evidence and finally discard it as it was opposed to the known yardsticks and elementary factors well provided for by the law and precedent."*

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas Mr. Jukael Reuben Jairo assisted by Mr. Nestory Mwenda, both learned State Attorneys appeared for the respondent Republic.

In support of the appeal the appellant fully adopted the grounds of appeal and did not wish to expound further, but opted to let the learned State Attorney respond first and retained the right to rejoin if the need to do so would arise.

On his part, Mr. Mwenda started by intimating to the Court that the respondent Republic contested the appellant's appeal with regard to the first ground, but supported the appeal on the second, third and fourth grounds of appeal.

Submitting in opposition to the first ground of appeal, Mr. Mwenda argued that the complaint of the appellant with regard to

the missing record is unfounded because according to the record of appeal efforts by stakeholders were made to trace the original record but it was not possible to obtain it. However, he emphasized that despite the absence of the original record, during the hearing of the appeal before the High Court most of the essential proceedings of the trial court, that is, the evidence of the witnesses of the parties and the judgment were in the record of appeal. To support his stance on the test to be applied to determine sufficiency of the record during the hearing of an appeal, he referred the Court to the decision in **Kubezya John v. The Republic,** Criminal Appeal No. 488 of 2015 (unreported) at page 4. Ultimately, he implored the Court to find the complaint in the first ground unfounded.

Admittedly, the issue of lack of the original record of the trial court's proceedings was noted at the hearing of the appeal by the High Court. In resolving the issue the High Court Judge stated as follows: -

> *"In the present appeal, despite that the original file could not be found but there is on the record the judgment and the*

proceedings of what transpired in the trial court. I am satisfied that the said judgment and the proceedings together with the submissions from the learned State Attorney and the appellant himself are sufficient for the court to proceed with the determination of this appeal."

We have closely examined the record of appeal before us and we agree with the first appellate judge that the available record of proceedings of the trial court sufficed to determine the appeal which was before her. We also acknowledge that before the hearing of the appeal sufficient efforts were made by stakeholders, including the appellant, to constitute the record of the trial court proceedings after it was patently concluded that the missing original record could not be traced. We are indeed settled that in view of the grounds of appeal which were raised in the petition of appeal by the appellant, the record of proceedings which were put at the High Court enabled it to determine the appeal. In an akin situation in the case of **Kubezya John v. The Republic** (supra) we made reference to our decision in the case of **The Director of Public Prosecutions v. Jackson Sifael Mtares & Three Others,** Criminal Appeal No. 2 of 2018 (unreported) in which we

were persuaded by the decision of the Supreme Court of Ghana in **John Bomiah @ Eric Annor Blay v. The Republic** [2015] in which it was observed as follows in respect of insufficiency of the record in an appeal: -

> *"The Cardinal principle is that the law does not demand a hundred percent perfect record of proceedings but such adequate record that can answer to the issues raised on appeal. Adequacy of the record test is therefore a question determinable on the facts, by reference to the grounds of appeal; weighed against the available record or alternatively the lost or destroyed record."*

Similarly, in the instant appeal, we are satisfied that the first appellate court properly proceeded to determine the appeal before it based on the available record of proceedings of the trial court in the absence of the original case file. Consequently, we agree with Mr. Mwenda that the first ground of appeal has no merit and we dismiss it. We now turn to consider the second and fourth grounds of appeal. As we intimated above, Mr. Mwenda fully supported the appellant's complaint in the second and fourth grounds with regard

to the insufficiency of evidence concerning the identification of the appellant at the scene of crime. Elaborating, he submitted that though PW1 testified that she identified the appellant by the aid of light from the torch, she did not describe properly the person she claimed to have encountered on that midnight. Indeed, he argued that, though PW1 claimed to recognize the appellant by face and shape at the scene of crime because she used to see him at the place of her business, the record is silent as to whether she reported the incident immediately to the police and described him in sufficient detail to facilitate his arrest. He added that the condition for identification in this case was not favourable and therefore the evidence was not watertight. To support his stance, he made reference to the decision of the Court in **Godfrey Gabinus @ Ndimba v. The Republic**, Criminal Appeal No. 273 of 2017 (unreported).

On the other hand, Mr. Mwenda argued that the other evidence which purported to link the appellant with the offence charged and to corroborate the identification that he was identified at the scene is shacky. This is because, he argued, those who participated during the search of the appellant's premises in which

the two pangas, two trousers, "maasai shuka," "kofia" and torch were found and admitted as exhibit P4 were not summoned to testify. In his submission, the failure to summon such important witnesses weakened the prosecution case.

In the circumstances, Mr. Mwenda concluded that as the identification of the appellant was not watertight, and this being the central issue for the determination of the case, the second and fourth grounds of appeal be allowed as the prosecution failed to prove the case beyond reasonable doubt.

In response to the third ground of appeal, Mr. Mwenda submitted that in the circumstances of the case at hand there was no need to conduct the identification parade as the appellant was not properly identified at the scene of crime and thus PW1 could not be able to identify him at the parade which was conducted by the police.

We take note of the concurrent findings of facts by both the trial and first appellate courts that the appellant was identified at the scene of crime. Indeed, it was found that apart from the torch light which facilitated proper identification of the appellant, he was

known to PW1 prior to the incident. To appreciate the reasoning and holding of the first appellate court when it confirmed the trial court's findings, we take liberty to reproduce the relevant part of the judgment thus: -

> *"Where an offence is committed at night it is common knowledge that light is the primary factor, which helps in the identification of a person. The light could come from any source, what matters is that it should be strong enough to enable the identifying witness to see and identify the person or accused properly (see the case of* ***Jimmy Zacharia vs. Republic Criminal Appeal No. 69 of 2006*** *(CAT) (unreported).*
>
> *In the present case the source of the light was from the torch belonging to PW1. The torch light according to PW1 was sufficient to identify the appellant because the batteries were new and further, she previously knew the appellant. He was not a stranger; she normally saw him at her place of business in Mbulu area. PW1 also saw the appellant at a close range because he took her to the siting room and raped her that*

means they were close. Further, they had ample time together, because the evidence showed that he arranged cushions, took off PW1 clothes and started having sexual intercourse with her. The time together is enough to enable PW1 identify the appellant. In the case of ***Abdallah Rajab Waziri vs. The Republic, Criminal Appeal No. 116 of 20004 (CAT-Tanga)*** *(unreported) the source of light was from a match. The Court established that such light was sufficient to identify a person who was known prior to the incident. Similarly, in the present case PW1 knew the appellant prior to the incident and since there was the light from the torch it was enough to properly identify the appellant. In view thereof, I am in agreement with the trial magistrate and the learned State Attorney that the identification of the appellant was proper in that there was enough light to identify the appellant. In the totality there was no mistaken identity whatsoever. This ground fails and is hereby disregarded."*

From the above except of the judgment of the first appellate court, we are of the considered opinion that the reasoning and

holding was consistent with the testimony of PW1. We better also reproduce it hereunder for the sake of clarity: -

> *"On 27/6/2012 at 00:00 hrs I was asleep at home Mbulu area where I was awaked by torch light inside my room. I also lighted my torch to those people. I managed to see one person while in Maasai shuka. He was wearing a cap I raised alarm where he threatened me by using a panga. The Masai shuka is red in colour with some drafts. He demanded to be given money but did not have. I told him that I already used the money to buy commodities. He took Tshs. 6,250/= which was on the table.*
>
> *He forced me to the sitting room and took cushions and put them on the floor. He forced me to remove all my clothes while using a panga. I complied and he started to rape me (aiinilazimisha nilale nikalala akaanza kunitomba). He put his panga beside me while raping me.*
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> *...In the morning I reported to police Kahama who prepared a PF3 for treatment. I was treated at hospital and have a PF3 in court...*

At the hospital it was revealed that I was raped. The one who raped me put on a Masaai sheet but was not a Maasai ....

The one who raped me is not a stranger to me as I used to see him. I identified him through torch light as I had put on new batteries on that day."

When PW1 was cross examined by the appellant she stated as follows: -

"I was surprised to find you inside the room I don't know how you opened as it was raining. You had a panga and threatened me...

I used to see you at Mbulu so I identified you by face and shape.

At police when reporting I said I identified the bandits by face."

The testimony of PW1 with regard to the incident of rape was corroborated by Janeth Kang'ombe (PW7) the Assistant Medical Officer who examined her on 27th March, 2012 and filled the PF3. It was PW7's findings that PW1 was raped.

From the foregoing reproduced testimony of PW1 it is clear that while the incident occurred at 00:00hrs in the midnight on 27/6/2012, she reported to the police in the morning and was later examined by PW7 on the same day after she obtained the PF3 from the police and that she informed them that she identified the bandits by face.

Indeed, according to the evidence in the record as per PW4 the appellant was arrested on 29th June, 2012, which was hardly within two days from the date of the incident, in connection of the accusation of rape and armed robbery. Thus, considering the period between the time and date of the incident and the date of arrest of the appellant, of which he did not dispute in his defence, it cannot be contended, as Mr. Mwenda attempted to argue, that PW1 did not describe the appearance of the appellant at the police when she reported the incident on the same date. It is thus not correct that PW1 did not report the incident immediately to the police as argued by Mr. Mwenda. The argument is not consistent with the evidence of PW1 we have reproduced above.

Therefore, in view of PW1's testimony, we entertain no doubt that her information to the police led to the arrest of appellant within two days after the incident and that is why, we think, he was arraigned at the trial court on 2nd July 2012. Indeed, according to the testimony of PW1 she told the police that she identified the bandit by face.

Moreover, we note from the record of appeal that in his defence the appellant did not seriously dispute the testimony of PW1 that she used to see him at her place of business prior to the incident. Besides, it is in the record that PW1 insisted even during cross examination that she identified the appellant by face and shape as she used to see him at Mbulu.

From the foregoing evaluation of evidence, we hold that the appellant was not necessarily identified but was recognized at the scene of crime as he was known by PW1. Indeed, as there was torchlight and considering the time PW1 and the appellant spent together during the incident of sexual intercourse, PW1 could not have failed to recognize the person whom she had seen before that particular day as correctly reasoned by the first appellate judge.

Thus, in the case at hand, the recognition of the appellant by PW1's was more clear than identification of the stranger and we think that is why based on her information he was arrested within a reasonable time after the incident of rape. Besides, in view of the testimony of PW1 in the record, we have no hesitation to conclude that both courts below correctly found her to be credible witness with regard to what transpired during the incident of rape and the involvement of the appellant in the commission of the offence.

In **Nicholaus Jame Urio v. The Republic,** Criminal Appeal No. 244 of 2010 (unreported), the Court quoted with approval the decision of the Court of Appeal of Kenya in **Kenga Chea Thoya v. The Republic,** Criminal Appeal No. 375 of 2006 (unreported), where it was stated that: -

> *"On our own evaluation of the evidence, we find this to be a straight forward case in which the appellant was recognized by witness PW1 who knew him. This was clearly a case of recognition rather than identification. It has been observed severally by this court, recognition is more*

satisfactory more assuring and more reliable
than that identification of a stranger."

Similarly, in the case at hand, we have no hesitation to state that in view of the evidence of PW1 which we have reproduced and the re-evaluation of the evidence we have done above, this is a clear case of recognition than identification. In the circumstances, we hold that even in the absence of the evidence from witnesses who witnessed the seized items from the premises of the appellant which were admitted as exhibit P4, the appellant cannot escape the fact that he was duly recognized by PW1 at the scene of crime in connection to the offence of rape.

In the event, we respectfully disagree with the learned State Attorney for the respondent Republic who supported the complaints of the appellant in the second and fourth grounds of appeal. In the result, we dismiss the respective grounds for lacking merit.

Lastly, with regard to the identification parade which is the appellant's complaint in the third ground, we entirely agree with Mr. Mwenda, albeit for different reason, that in the circumstances of this case it was not necessary to conduct it. This is because, as

the appellant was not a stranger to PW1 (the victim of sexual intercourse), the identification parade had no useful purpose to serve. When the Court was confronted with an akin situation in **Doriki Kagusa v. The Republic,** Criminal Appeal No. 174 of 2004 (unreported) it observed as follows: -

> *"The identification parade was absolutely unnecessary where the identifying witnesses or witness knew the suspect before the incident, it is superfluous and waste of resources to conduct such a parade. We have asked ourselves this question; the identification parade is held to achieve what purpose when the suspect is well known to the identifying witnesses? Our answer has already been indirectly given above. It is unnecessary and a waste of time."*

Similarly, in the instant case, since PW1 knew the appellant before the incident, and recognized him at the scene of crime on the fateful day, it was not necessary to conduct the identification parade. In the event, we discount it and disregard the third ground of appeal.

From the foregoing, we hold that the appellant was correctly convicted and sentenced of the offence of rape which he stood charged in the third count. Therefore, we dismiss the appeal in respect of the third count.

However, we have carefully scrutinized the evidence in the record of appeal and we are of the settled opinion that the prosecution did not prove the case against the appellant with regard to the offence of armed robbery. The evidence of PW1 is very clear that it was other suspects she did not identify properly who were involved in armed robbery and stole properties worth TZS. 119,750.00 as the appellant was busy having sexual intercourse with her. Besides, the respective charge could not stand as the other person (Miraji Hussein) who they were jointly and together charged in connection of that offence was acquitted by the trial court.

In the circumstances, we allow the appellant's appeal with regard to the conviction and sentence on the second count of armed robbery.

In the end, save for what we have found and held with regard to the second count in respect of the offence of armed robbery, we dismiss the appeal against conviction and sentence with regard to the offence of rape. The appellant shall continue to serve his sentence in respect of the offence of rape.

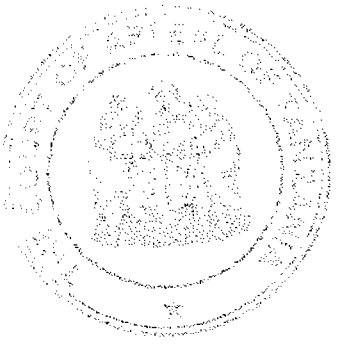
DATED at **SHINYANGA** this 27th day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 27th day of August, 2021 in the presence of appellant in person and Mr. Jukael Reuben Jairo, learned State Attorney for the respondent Republic is hereby certified the true copy original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL