IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A., SEHEL, J.A. And KAIRO, J.A)

CRIMINAL APPEAL NO. 453 OF 2018

HANDO HAU @ HAU PETRO..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mzuna, J.)

dated the 26th day of October, 2018
in
Criminal Appeal No. 94 of 2017

JUDGMENT OF THE COURT

08th & 14th February, 2022

SEHEL, J.A.:

This is a second appeal by the appellant, Hando Hau @ Hau Petro who was charged before the District Court of Babati at Babati (the trial court) with the offence of rape contrary to sections 130 (1) (2) (a) and 131 (1) of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019). It was alleged by the prosecution that on 13th December, 2016 at Saydoda village, within Babati District in Manyara Region the appellant did have sexual intercourse with a woman whom we shall refer to by her acronym PZ or simply the

victim (PW1) without her consent. After a full trial, he was found guilty as charged, convicted and sentenced to thirty (30) years imprisonment. Aggrieved, he appealed to the High Court (the first appellate court) against both conviction and sentence. However, his appeal was dismissed for want of merit hence this second appeal.

A brief account of the evidence that led to the conviction and sentence of the appellant is such that: On 13th September, 2016 Remina Samson (PW2) and her friend PZ or rather the victim (PW1) were going home after attending a KKKT gospel meeting which was held at Saydoda village. On their way, they met the appellant whom they both said that they knew before as they resided in the same village and the victim used to see him at a village center locally known as "kijiweni". As to how they were able to see and recognise the appellant, the victim told the trial court that on that night she held a torch.

According to the evidence of PW1, the apellant grabbed her hand and tightly held it. When she tried to plead with him, he refused. Even when PW2 tried to assist the victim, the appellant chased her away and threatened to kill her. Fearing that she would be killed, PW2 left them

alone. Seeing that her friend was leaving her behind, she tried to raise an alarm but the appellant slapped her face and covered her mouth with his hands. He dragged her to a grass bush nearby Saydoda Primary School, approximately 30 steps from the road. He then laid her down, covered her mouth with his "*mgolole*" cloth which he had put on, underssed her and forcefully penetrated his penis into her vagina. She felt pain but could not raise any alarm because her mouth was covered with a cloth. Having satisfied his desire, the appellant left her there alone, in the dark, helplessly. She collected herself, put on the clothes and headed back home. At home, she found her mother and explained to her the ordeal on that same night. As it was in the late hours, they slept till the next day. In the morning, they went to the Village Executive Officer, one Ismail Hussein Abed (PW3) to report the matter. PW3 with the help of the militiamen arrested the appellant on 15th September, 2016. Ultimately, the matter was reported to Babati Police Station where the Detective Corporal Jerry (PW5) investigated the case and arraigned the appellant before the District Court of Babati at Babati.

The victim was issued with a PF3 for medical examination. She went to Secheda health centre. The Clinical Officer one Atanasio Zachayo (PW4) examined her and found out that the victim had bruises in her labia majora surrounding her vagina and blood. With that observation, PW4 concluded that a hard object forcefully penetrated the victim's vagina. She filled PF3 which was admitted as Exh. P1.

In his defence, the appellant raised a defence of *alibi* that, on the tragic day he went to Diwi village where there was a sport competition and returned home on the next day, that is, the 14th September, 2016 at around 01:40 hours. He however, admitted to have been arrested on 15th September, 2016 by the militiamen.

At the conclusuion of the trial, the appellant was found guilty, convicted and sentenced as alluded to earlier on. Aggrieved, he unsuccessful appealed to the High Court. Still aggrieved, he has come to this Court with five (5) grounds of appeal. **First**, the charge was not proved to the required standard, that is, proof beyond reasonable doubt. In the **second** and **third** grounds of appeal, the appellant complained that the condictions at the scene of crime were not favourable to rule out

mistaken recognition. **Fourth**, the material witness who was the victim's mother was not called as a witness to give credence on the PW1's evidence. **Fifth**, his defence of alibi was not considered by the trial court.

At the hearing of the appeal, the appellant appeared in person, unrepresented and the respondent Republic was represented by Ms. Riziki Mahanyu, learned Senior State Attorney assisted by Ms. Grace Madikenya and Mr. Charles Kagirwa, both learned State Attorneys.

When the appellant was called upon to submit on his grounds of appeal, he opted to hear the submission from the Republic first and reserved his right to rejoin, if need arise.

In reply, Mr. Kagirwa supported both the conviction and sentence meted against the appellant. He began his submission by addressing us on the second and third grounds of appeal where the appellant complained that there was no proper identification. Mr. Kagirwa contended that the ground is baseless as the record of appeal shows that PW1 and PW2 knew the appellant prior to the incident as they were residing in the same village and according to the evidence of PW1, she used to see him at the village

center. He added that the evidence of PW1, found at pages 12 – 15 of the record of appeal, established that the two, that is, the appellant and the victim spent a considerable time together hence the victim had ample time to observe the appellant. Besides, he argued, on the fateful night, the victim had a torch which aided her to see the appellant. He pointed out that the evidence of PW1 was corroborated by PW2 that PW1 was holding a torch on that night and the appellant was not a stranger. According to Mr. Kagirwa, given the prevailing conditions that there was a torch light, the victim had ample time to observe the appellant whowas familiar to both PW1 and PW2, and thus, there was no mistaken identity. He argued that the appellant was positively recognized by PW1 and PW2. To bolster his submission, he made reference in the case of **Waziri Amani v. The Republic** (1980) TLR 250 that set conditions for proper identification which he argued in the present appeal, they were met. He therefore submitted that the second and third grounds of appeal lacks merit and ought to be dismissed.

Responding on the fourth ground of appeal that the mother of the victim was not called to give evidence so as to lend credence to the victim's

account, relying on the decision of this Court in the case of **Selemani Makumba v. The Republic** [2006] T.L.R 379, Mr. Kagirwa contended that the mother was not a material witness as in rape cases, the best evidence comes from the victim, herself. He thus urged us to dismiss the ground as it lacks merit.

Regarding the fifth complaint that the trial court failed to consider his defence of *alibi* that on 13th September, 2016 he went to Diwi village and returned on 14th September, 2016, Mr. Kagirwa contended that the complaint is baseless because the record is clear as at page 34 of the record of appeal, the trial magistrate considered his defence, he ruled it out.

With respect to the first ground of appeal that the prosecution failed to prove the offence against the appellant, the learned State Attorney argued that the ground lacks merit because the victim gave a coherent account on how she met, identified and recognized the appellant by the aid of the torch and he was not a stranger to her and that the appellant grabbed her hand, pulled her to a grass bush near Saydoda Primary School, undressed and forcefully inserted his penis into her vagina. Mr.

Kagirwa submitted that the evidence of PW1 was corroborated by PW2 and PW4. PW2 corroborated the fact that PW1 held a troch on that night, they met the appellant on their way back home, the appellant was not a stranger to them because he was their village mate and that the appellant grabbed PW1's hand. Mr. Kagirwa further submitted, although the PF3 was not read over to the appellant hence it ought to be expunged from the record, however, the oral account of PW4 proved the act of penetration because in his evidence in chief he said that after he had examined the victim, he found out that the victim's vagina was forcefully penetrated by a hard object. In that regard, the learned State Attorney firmly submitted that the three prosecution witnesses namely, PW1, PW2 and PW4 proved the offence against the appellant his defence did not shake the prosecution case because he was correctly identified at the scene of crime by PW1 and PW2. He therefore urged us not to disturb the conviction and sentence. At the end, he prayed to the Court to dismiss the appeal.

The appellant had nothing to re-join apart from urging us to consider his grounds of appeal, allow the appeal and release him from prison custody.

Having heard the submissions by the learned State Attorney, we revisited the grounds of appeal and appraised ourselves on the entire evidence found in the record of appeal. From the outset, we wish to state that in disposing the appeal, we shall be mindful of the position of the law that the Court rarely interferes with the concurrent findings of fact by the courts below unless it is found that there were mis-directions, non-directions on the evidence, a miscarriage of justice or a violation of some principle of law or practice – see the cases of **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and **Musa Mwaikunda v. The Republic** [2006] TLR 387).

Coming to the appeal, we shall first deal with the procedural irregularity pointed out by Mr. Kagirwa regarding PF3, Exh. P1. It is true at page 19 of the record of appeal, it bears out that PF3 was admitted in evidence by PW4 without objection but after its admission it was not read over to the appellant. It is now settled law that once a document has been cleared for admission and admitted in evidence, it must be read out in court. Failure to do so occasioned a serious error amounting to miscarriage of justice – see the cases of **Sunni Amman Awenda v The Republic**,

Criminal Appeal No 393 of 2013; **Jumanne Mohamed and 2 Others v. The Republic**, Criminal Appeal No. 534 of 2015; **Manje Yohana and Another v. The Republic**, Criminal Appeal No. 147 of 2016; and **Issa Hassan Uki v. The Republic**, Criminal Appeal No. 129 of 2017 (All unreported).

The essence of reading the tendered document was succinctly stated in the case of **Joseph Maganga and Dotto Salum Butwa v. The Republic**, Criminal Appeal No. 536 of 2015 (unreported) thus:

> *"The essence of reading out the document is to enable the accused person to understand the nature and substance of the facts contained in order to make an informed defence. Failure to read the contents of the cautioned statement after it is admitted in evidence is a fatal irregularity. "*

Accordingly, Exh. P1 is hereby expunged from the record because it was not read over to the appellant after it was admitted in evidence.

Having dealt with the procedural irregularity, we now turn to the remaining grounds of appeal. We shall deal with the grounds in accordance with the order of the sequency as submitted by the learned State Attorney.

Starting with the second and third grounds of appeal where the appellant complained that the evidence of identification was weak and unreliable because the circumstance and conditions at the scene of crime were not conducive for proper and correct identification by recognition. In this appeal, there is no doubt that the incident took place at night and that the evidence of identification came from the victim (PW1) and PW2. It be noted that the trial court gave credence to these two identifying witnesses hence concluded that the appellant was positively identified and recognized. Although the first appellate court noted that the intensity of the torch light was not stated by PW1 and PW2, it concurred with the trial court that the appellant was positively identified by PW1 and PW2.

On our part, having appraised the evidence on record, we see no reason to fault the concurrent findings of the two lower courts. We agree with the learned State Attorney that the appellant was positively recognized by PW1 and PW2. We shall give our reasons. **One**, PW1 had a torch that aided her together with PW2 to identify and recognize the appellant. **Two**, the appellant was not a stranger to them as they all resided in Saydoda village. **Three**, both PW1 and PW2 regularly used to

meet the appellant at the village center. **Four**, the appellant conversed for quite some time and spent considerable time with both PW1 and PW2 as such, the identifying witnesses had ample time to observe the appellant. Therefore, taking cumulatively the circumstances as explained herein, we fully agree with the first appellate court that though the intensity of the torch light was not explained by the identifying witnesses, the conditions were favourable and enabled unmistaken recognition of the appellant by PW1 and PW2.

Our position is fortified by our earlier decision in the case of **Athumani Hamis @ Athuman v. The Republic**, Criminal Appeal No. 288 of 2009 (unreported). In that appeal, we were dealing with the identification of the appellant through recognition and said: -

> *"Under the circumstances where the appellant recognised the appellant because of knowing him before, and given the conditions which made the complainant to recognise the appellant, it is safe to say that there was no mistaken identity of the appellant. In the Kenyan case of* ***Kenga Chea Thoye v. The Republic,*** *Criminal Appeal No. 375*

of 2006 (unreported), the Court of Appeal of Kenya held that: -

"Recognition is more satisfactory, more assuring and more reliable than identification of a stranger."

Further, in the case of **Rajabu Khalifa Katumbo and Three others v. The Republic** [1994] TLR 129 we held: -

"Although the offence was committed at night, there were two lamps in the corridor inside the house which facilitated the identification of the offenders. The accused were known to the witnesses well before the day of the incident; the witnesses, therefore, were extremely unlikely to mistake them."

Since the identification of the appellant was through recognition which is more assuring and reliable, we are satisfied that the appellant was positively identified by PW1 and PW2. Besides, the victim mentioned the appellant immediately after the incident to her mother. We are alive that it is the appellant's fourth ground of appeal that the mother was not called as a witness to give credence to PW1's account. We shall come to that complaint but here let us stress that it is a cardinal principle that 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 inquiry – see the case of **Marwa Wangiti Mwita and Another v. The Republic** [2002] T.L.R. 40. That said, we find that the second and third grounds of appeal have no merit and we as well dismiss them.

We now turn to the fourth ground of appeal on failure by the prosecution to call the mother of the victim. As rightly submitted by the learned State Attorney, the mother was not a material witness because she was not at the scene of the crime and in sexual offences, the best evidence comes from the victim herself. As such, the mother of the victim could not have added any value to PW1's account. Her evidence would have been treated as hearsay. Hence, this ground has no merit and we dismiss it.

The fifth ground of appeal that the trial court failed to consider his defence of *alibi* also lacks merit. The evidence on record does not support his claim, as pointed out by Mr. Kagirwa. At page 34 of the record of appeal, the trial magistrate considered his defence but he ruled it out. Even the first appellate court considered his defence of alibi and at the end it concurred with the trial court that the appellant was correctly identified and

placed at the scene of crime by PW1 and PW2. This is reflected at pages 66 – 67 of the record of appeal. We, as well, find that the defence of *alibi* is wanting of merit as the appellant was rightly placed at the scene of crime by PW1 and PW2. We thus, dismiss this ground of appeal.

With regard to the first ground of appeal, we are firm that the prosecution proved the case to the required standard; that is, beyond reasonable doubt. As alluded earlier, the appellant was charged with an offence of rape contrary to sections 130 (1) (2) (a) and 131 (1) of the Penal Code. The first appellate court correctly applied its mind that for this kind of rape which falls under section 130 (1) (2) (a) of the Penal Code, there must be proof of penetration and lack of consent. As far as proof of penetration and lack of consent is concerned, we have shown herein that they were sufficiently established and proved by the victim herself (PW1) whose evidence is the best in sexual offences – see the case of **Selemani Makumba** (supra). The evidence of PW1 is corroborated by the medical examination of PW4 which found out that the victim's vagina was forcefully penetrated by a sharp object. Further, PW2 corroborated the fact that PW1

was grabbed and dragged by the appellant. In that regard, we find that the ground is baseless. We dismiss it.

In the end, we find the appeal lacks merit and we do hereby dismiss it.

DATED at **ARUSHA** this 14th day of February, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 14th day of February, 2022 in the presence of the Appellant in person and Mr. Kagirwa Charles, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL