

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: LILA, J.A., KITUSI, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 469 OF 2019

GOD SALEHE @ SHAIBU SALEH.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Kaganda, J.)

dated the 2nd day of September, 2005

in

DC. Criminal Appeal No. 66 of 2018

.....

JUDGMENT OF THE COURT

18th & 24th March, 2022

KITUSI, J.A.:

The District Court of Njombe, before which the appellant God Salehe @ Shaibu Saleh was charged with five counts, convicted him on all and sentenced him to a maximum imprisonment term for life. It acquitted Zamoyoni Chuma @ Maandazi and Deogratias Mgeta @ Teacher who had been jointly charged with the appellant as the second and third accused, respectively.

The three had been charged with armed robbery under section 287A of the Penal Code, [Cap 16 P.E 2002], allegedly for stealing TZS 1,070,000.00, a mobile phone make Nokia, a bicycle, a DVD player, make Sony and another cash TZS 99,000.00 all being properties of

Costa Nyagawa and that they executed that robbery under gun point, iron bar, machete and a club to threaten the said Costa Nyagawa.

They were also charged with two counts of gang rape contrary to section 131 A (1) and 2 of the Penal Code, it being alleged that in the course of the robbery, the trio had carnal knowledge of Bertha Chafumba and PW3, the daughter of PW1 respectively. Lastly, they charged them with two counts of causing grievous harm contrary to section 225 of the Penal Code, the prosecution alleging that the assailants caused grievous harm respectively to Costa Nyagawa and Fredy Nyagawa.

The evidence that led to the conviction of the appellant and acquittal of the two who had been charged jointly with him, was as follows: Costa Nyagawa (PW1) owned what he referred to as a small shop at Ilunda village within Njombe District. His younger brother Fredy Nyagawa (PW5) was the attendant at that shop, and used to spend his nights at that shop, keeping guard.

During the small hours of 27/7/2016 while PW1 and members of his family were sleeping, three people broke into the house wielding a shot gun, machete and an iron bar. They stormed into PW1's bedroom and ordered him to surrender all the money he had in his possession at the moment, while assaulting him using the iron bar.

At the same time, they ransacked the room and took from under the mattress, a total of TZS 1,070,000.00. The bandits left PW1 helpless after tying his hands and feet as they went into the rooms occupied by other family members. PW1 testified that the light in the house, which the culprits switched on upon entry, enabled him to identify them.

Meanwhile PW2 and PW3 testified on the alleged rape. PW2 stated that as she was sleeping in the house of PW1, her brother-in-law, in the same room with one Angel Nyagawa, the bandits entered and ordered her to stand up. She initially resisted because she was naked and she was also physically challenged. These pleas did not deter the bandits who moved PW2 to another room while assaulting her. Two assailants had sex with her by force but she identified only the appellant as one of them because she used to see him on market days at Ilunda. The others, she said during cross examinations, were not easy to identify because they had their heads masked by pieces of cloth.

The same fate befell PW3. She was forced to go into other bedrooms to look for money but in the end, two of them ravished her. PW3 identified the appellant and third accused as the persons who raped her. When responding to cross-examinations, PW3 said she also identified the second accused because, like the third accused, he did not mask his face.

Later the bandits ordered PW1 and his daughter PW3 to lead them to the shop. PW5 opened the door upon being asked by PW1 to do so. PW5 testified that he was attacked by the bandits who demanded money from him, after assaulting him by the iron bar to stop his screams. The bandits took TZS 170,000.00 from the shop and left after tying PW1, PW3 and PW5, and locking them up. When the three captives were sure that the assailants had gone, they raised alarms which were responded to by Sadick Kibiki (PW6), their neighbour. PW6 had to break into the shop to help the victims and with the help of other people, he took the victims to hospital.

It is important to observe that PW5 testified that he knew the person who had stood as the third accused. This person's name was Deogratias Mgeta @ Teacher but PW5 kept referring to him as God Salehe. The latter is the name of the appellant who had stood as the first accused during trial.

A police officer known as Raphael Mlangwa (PW8) conducted different identification parades for the culprits. He stated that in the course of the parade for the appellant which he said he observed the law to the letter; all witnesses, that is, PW1, PW2, PW3 and PW5 identified the appellant as God Salehe. When cross-examined by the

appellant, PW2 conceded that during the parade she first mistook him for one Ramadhani.

In defence the appellant-maintained denial of any involvement and that even with torture by a group of police officers including Yesaya Sudi and James Hamis he stuck to the story that he was a victim of mere suspicion.

On the evidence of visual identification by PW1 the trial court found the appellant guilty of armed robbery and the two counts of grievous harm. And on the evidence of PW2 and PW3 it found him guilty of the two counts of gang rape respectively. It took the view that PW2's mistaken identity of the appellant as Ramadhani was resolved by her in the course of her testimony. It however found PW3's testimony contradictory as far as the identity of the third accused was concerned because she did not come out clear whether he was masked or not.

On the first appeal, the appellant's contention that the prosecution case was weak for mainly being mounted on evidence of relatives, was dismissed by the learned judge as baseless citing the case of **Mustafa Ramadhani Kihyo v. Republic** [2006] TLR 323. He proceeded to find PW1, PW2 and PW3 reliable and that the cautioned statement recorded from the appellant was properly taken and relied upon. He found the charges of gang rape to have been proved by PW2 and PW3,

the victims, taking cognizance of the principle in **Selemani Makumba v. Republic** [2006] TLR 379 that the best evidence of sexual offences comes from the victim. The learned judge ruled out the argument that the evidence of PW2's required corroboration. He cited section 127 (1) of the Evidence Act as supporting the view that corroboration is unnecessary where, as in this case, the court is satisfied that what the witness said is nothing but the truth.

As for the identification parade, the learned judge was satisfied that its conduct observed the procedure, and that PW1, PW2 and PW3 who had seen the appellant previously made the parade all the more authentic.

The appellant had also complained against being convicted of gang rape after the other suspects had been acquitted. To this, the learned judge observed that the charge could not be amended after close of hearing and that the mere acquittal of the other two, would not render the charge of gang rape unmaintainable. He cited **Imani Charles Chumanyo v. Republic**, Criminal Appeal No. 382 Of 2016. (unreported).

In the end he was satisfied that the evidence of visual identification given by PW1, PW2 and PW3 was solid because the house was well illuminated, the distance between the witnesses and the

appellant close and the time spent in observing him was considerably long. He was satisfied that the possibility of mistaken identity had been eliminated, citing the celebrated case of **Waziri Amani v. Republic** [1980] TLR 250.

The appellant has 7 grounds to prosecute this appeal. He appeared in person while Messrs Yahya Misango and Matiku Nyangero, learned State Attorneys, represented the respondent Republic.

In summary, the grounds of appeal are: -

- 1. The High Court wrongly upheld his conviction on gang rape while that offence cannot be committed by one person.*
- 2. The first appellate judge wrongly dismissed his appeal without addressing the inadequate evidence of visual identification which did not describe the intensity of the light.*
- 3. The identification parade was not properly conducted and the two courts should not have relied on it.*
- 4. That it was wrong to conclude that PW2 and PW3 had been raped merely on the evidence of there being sperms in their private parts.*
- 5. The High Court erred in relying on the cautioned statement of the appellant which the trial court had disregarded.*

6. That the learned judge erred in not finding PW3 not credible in view of the contradictions in her testimony.

7. That the prosecution failed to prove the case beyond reasonable doubt.

The appellant merely adopted the grounds of appeal with nothing to add. Mr. Nyangero supported the appeal and chose to address us on mainly one point, to wit, visual identification. We endorsed the learned State Attorney's scheme because the issue of identification prominently features in grounds 2, 3 and 6 of appeal.

Mr. Nyangero attacked the evidence of visual identification on several fronts. First, he submitted, there is no evidence that PW1, PW2 and PW3 who purported to have identified the appellant at the scene of crime, mentioned him to anyone, not even to PW6 who turned up at the shop to rescue them. The other shortcoming is that these witnesses did not describe the appellant prior to the identification parade and he cited the case of **Thomas Joseph Charles @ Chitoto @ Chitema v. Republic**, Criminal Appeal No. 95 of 2020 (unreported). And again, Mr. Nyangero argued, the identification parade was uncalled for as all witnesses claimed that the appellant was a familiar person to them. The learned State Attorney further submitted that although it could be said that PW2 and PW3 had a closer view of the appellant during the commission of the alleged rape as it was decided in the case of

Jumapili Msyete v. Republic, Criminal Appeal No. 110 of 2014 (unreported), it does not apply in this case where PW2 had mistaken the appellant for somebody Ramadhani. The learned State Attorney even wondered as to the type of report PW1 may have made to the police so as to prompt them arrest the appellant.

With respect, we entirely agree with Mr. Nyangero that the appeal turns on the issue of visual identification. Before making any specific findings on that ground of appeal, we wish to make one observation in relation to the alleged identity of the appellant.

For some reason, it appears that PW1, PW2 and PW3 were tutored to mention the appellant as the culprit. PW3 blew out the conspiracy when responding to cross examinations by the third accused by saying at page 30: -

"The police did not tell me your name but they told me the name of God Salehe".

PW5's drama was no better. He said he did not identify the appellant, but when responding to questions put by the third accused, he stated: -

"I did not identify your face on the night of the incident. Yes, I identified you as God Salehe. Yes, I am sure you are God Salehe."

It should be recalled that earlier, PW2 had picked one Ramadhani mistaking him for the appellant. The foregoing does not speak well of

the credibility of the prosecution witnesses, and when the time comes, we shall consider their testimonies with that caution in mind.

Back to the arguments. First of all, we quickly agree with Mr. Nyangero that identification parades serve no useful purposes when the witnesses know the culprits before. See our decisions in **Sadick Hamis @ Rushikana & 2 others v. Republic**, Consolidated Criminal Appeals No. 381, 382 and 383 of 2017; **Charles Nanati v. Republic**, Criminal Appeal No. 286 of 2012 and; **Mbaruku Deogratias v. Republic**, Criminal Appeal No. 279 of 2019 (All unreported). We similarly hold that the identification parade in this case and the evidence in its reference did not add any value to the prosecution case.

Secondly, the failure by PW1, PW2 and PW3 to mention the culprits to PW6 who immediately turned up to offer assistance to the victims, renders their story suspect. It is a well-known principle that the ability of a witness to name the suspect at the earliest opportunity, tends to render assurance of reliability of his evidence of visual identification. [See **Marwa Wangiti and Another v. Republic** [2002] T.L.R 39].

Thirdly, there were material contradictions between PW1, PW2 and PW3 as to which of the assailants were wearing masks. The learned High Court judge appreciated this fact only in relation to PW3

and dealt with her evidence in isolation. With respect since there is no way we can tell as to which of the witnesses had the facts correct, and in view of their obvious inclination to nail the appellant to the cross, this contradiction must affect all of them. As the prosecution case rested on the evidence of these three witnesses, it is stark clear that it rested on a shaky foundation. We are not losing memory of the fact that PW2 had exhibited uncertainty in identifying the appellant and PW3 had outright shot at the feet of the prosecution's case by disclosing that the police gave her the name of the appellant.

In the end it is not possible to sustain the convictions for the reason that the evidence on record does not place the appellant at the scene of crime, a complaint in grounds 2, 3 and 6. We are not going to consider other grounds of appeal because the issue of inadequate evidence of identification is sufficient to dispose of this appeal.

In passing, we have to remind trial courts and prosecutors that it is quite irregular to charge a person with the offence of armed robbery and causing grievous harm as separate counts in the same charge, if they are not in the alternative. Assault or causing grievous harm is an ingredient of the offence of armed robbery if it is committed in the course of stealing. We have had occasions to make similar pronouncements in, **Hebron Kasigala v. Republic**, Criminal Appeal

No. 3 of 2020 and **Raymond Mwinuka v. Republic**, Criminal Appeal No. 366 of 2017 (both unreported).

All said, on the basis of grounds 2, 3 and 6 raising the issue of visual identification, this appeal has merits. We quash the convictions and set aside the sentences. The appellant should be released forthwith if not held for some other lawful cause.

DATED at **IRINGA** this 24th day of March, 2022.

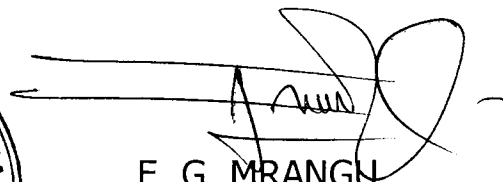
S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 24th day of March, 2022 in the presence of appellant in person and Ms. Magreth Mahundi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL