IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: KWARIKO, J.A., SEHEL, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 60 OF 2022

HASSANI SHABANI @ UGOYA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, Tanga District Registry at Tanga)

(Agatho, J.)

dated the 26th day of July, 2021
in
(DC) Criminal Appeal No. 57 of 2020

.....

JUDGMENT OF THE COURT

5th & 11th May, 2022

KWARIKO, J.A.:

This appeal was filed by Hassan Shabani @ Ugoya against the decision of the High Court of Tanzania (Agatho, J), Tanga District Registry at Tanga (the High Court), in (DC) Criminal Appeal No. 57 of 2020 dated 26th July, 2021. In that appeal, the High Court dismissed the appellant's appeal which he had filed against the decision of the District Court of Muheza (the trial court) which convicted the appellant of two counts; namely, **one,** rape contrary to sections 130 (1) (2) (e) and 131 (1); and **two,** grievous harm contrary to section 225, both preferred under the Penal Code [CAP. 16 R.E. 2002; now R.E. 2019].

The particulars of the offences were that, on 4th day of April, 2019 at about 06.00 hours at Mhamba village within Muheza District in Tanga Region, the appellant had carnal knowledge of one 'FA' a girl aged 17 years (name withheld to disguise her identity). Further, in the course of committing the rape, the appellant cut the victim with sharp object on her fingers and she suffered grievous harm.

The appellant denied the charge but upon a full trial, he was found guilty, convicted and sentenced to imprisonment of thirty years in the first count and three years in the second count. However, although the trial court was supposed to indicate whether the terms of imprisonment would run concurrently or consecutively, it did not do so.

At the trial, the prosecution brought a total of six witnesses to prove the charge, whilst the appellant testified on his own behalf and called two witnesses to support his case. The evidence from both sides can briefly be recapitulated as hereunder.

On 4th April, 2019 at about 6:00 hours, the victim who testified as PW1 was going to school in the company of her two siblings whose names are withheld to preserve their identity thus we shall refer them only as PW2 and PW3. Whilst on the way, a person appeared from behind and when PW2 turned around, she recognized him as the appellant who was holding a knife and had put on black shorts. She informed PW1 about that

person and all three started running away but the appellant managed to pull up PW1's hijab and dragged PW1 into the bush. She identified him to be the appellant whom she knew before as she had seen him in the village. As she was shouting, he cut her left-hand fingers with knife leading to bleeding. In the bush, he undressed her under garments and pulled her skirt over her head as it was difficult to remove. He also removed his black shorts. Thereafter, he entered his penis into her vagina where she felt pain and when he wanted to enter her against the order of nature, they heard people coming and the appellant ran away. Those people had responded to the alarm made by PW2 and PW3 as they had run into the village and reported about the incident. PW1 was taken to their school board chairperson to await being taken to the police station.

One Mwanahawa Salimu Rashidi (PW4), who identified herself as the Village Executive Officer (VEO) of Mhamba, called on her office at about 07:45 hours of the material date and shortly thereafter, PW1 arrived there in the company of her mother. PW1 had dirty clothes and injuries in her hands and upon inquiry, PW1 revealed that she had been raped by Hassan Shabani whom she knew before. She referred her to the police station to get a PF3 for treatment in hospital. Thereafter, the villagers started to look for the appellant and was later apprehended.

At the hospital, PW1 was examined by Dr. Fortunata John Kihinga (PW6) and it was established that PW1 was injured in her fingers and had multiple bruises, whitish mucus in the vagina and stool in the anus and she had no virginity. PW6 filled in the PF3 which was received in evidence as exhibit P1.

Further, at the police station, No. G 6017 D/C Michael (PW5) was assigned to investigate the case. When he interrogated the appellant, he denied the allegations. Thereafter, he took the complainant to the scene of crime and later sent the appellant to court.

In his defence, the appellant denied the allegations and explained that on the material date, while at home, he heard the news of this incident and together with his relatives including Athumani Issa (DW2) and Issa Rashid Time (DW3) with whom they shared a residence, joined other villagers at the scene to search for the assailant but in vain. When they converged at the village office, the appellant was arrested as the suspected rapist. Essentially, this raised a defence of *alibi* to the effect that at the material time, he was at home. The appellant also complained that the case was fabricated against him by his aunt and PW4 due to land dispute between them.

In its judgment, the trial court found that the appellant was sufficiently identified at the scene as the one who committed the charged

offences. He was thus convicted and sentenced as indicated earlier. The High Court upheld the findings of the trial court.

Before this Court, on 1st March, 2022, the appellant filed a memorandum of appeal containing six grounds and a supplementary memorandum of appeal on 29th April, 2022, with five grounds. In terms of rule 74 (1) of the Tanzania Court of Appeal Rules, 2009, he also lodged a written statement of arguments to amplify his grounds of appeal. We have paraphrased the grounds of appeal into the following eight grounds of complaints:

1. *That, the offences of rape and grievous harm were wrongly charged together;*
2. *That, the trial court erred for its failure to remind the appellant of the charge before he gave his defence;*
3. *That, the defence evidence was not considered;*
4. *That, the evidence of visual identification was not proved against the appellant;*
5. *That, the prosecution evidence was contradictory;*
6. *That, failure of villagers who traced the suspect to testify affected the prosecution case;*
7. *That, the case was framed up against the appellant because of land dispute between the appellant, his aunt and PW4; and*

8. That, the prosecution case was not proved beyond reasonable doubt against the appellant.

On the day the appeal was called on for hearing, the appellant appeared in person, without legal representation. On the other hand, Messrs. Emmanuel Barigila and Paul Kusekwa, together with Ms. Elizabeth Muhangwa, all learned State Attorneys, teamed up to represent the respondent Republic.

Before we deliberate the merit or otherwise of the grounds of the appeal, we would like first to deal with one legal point that was raised by Mr. Kusekwa who argued the appeal on behalf of his learned colleagues. His submission commenced by stating his stance that he was not supporting the appeal. He went on to argue that the 6th and 7th grounds of appeal are knew as they were not raised before the High Court and thus the Court has no jurisdiction to entertain them. He fortified his contention with our previous decision in **Makende Simon v. R,** Criminal Appeal No. 336 of 2016 (unreported). Being a lay person, the appellant did not have anything to contribute on this issue.

Having perused the record of appeal; we agree with the learned State Attorney that the two grounds were not raised before the High Court and thus the Court lacks jurisdiction to entertain them. Faced with a

similar scenario in the case of **Julius Josephat v. R,** Criminal Appeal No. 3 of 2017 (unreported), the Court observed thus:

> *".... those three grounds are new. As often stated, where* ***such is the case, unless the new ground is based on a point of law, the Court will not determine such ground for lack of jurisdiction."*** [Emphasis added]

See also **Juma Kasema @ Nhumbu v. R,** Criminal Appeal No. 550 of 2016 and **Amos Masasi v. R,** Criminal Appeal No. 280 of 2019 (both unreported).

Therefore, like it was stated in the cited cases, we also have no jurisdiction to entertain the 6th and 7th grounds as they are new and not based on points of law. They are thus disregarded.

Going forward, in his written arguments, the appellant did not give further explanation in respect of the first ground of appeal. However, we are in agreement with Mr. Kusekwa that, this ground lacks merit because the prosecution did not err to charge the offences of rape and grievous harm together because they were alleged to have occurred in the course of the same transaction, place, date and time. Section 133 (1) of the Criminal Procedure Act [CAP. 20 R.E. 2019] (the CPA) which is relevant in this matter provides thus:

"133. - (1) Any offences may be charged together in the same charge or information ***if the offences charged are founded on the same facts*** *or if they form or are a part of, a series of offences of the same or a similar character."* [Emphasis supplied]

Therefore, because the two offences were alleged to have happened in the same course of events, sharing the same facts of the case, they were correctly preferred in the same charge.

Again, the appellant did not explain the second ground. His complaint is that, the charge was not reminded to him before he gave his defence. We have gone through the record of appeal and found that this ground lacks merit. As correctly argued by the learned State Attorney, when the prosecution case was closed, the trial court ruled out that a *prima facie* case was made out against the appellant sufficiently to require him make his defence and it addressed him in terms of section 231 of the CPA before he was called upon to give his defence. This provision states thus:

"231.- (1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charge or in relation

to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right–

(a) to give evidence whether or not on oath or affirmation, on his own behalf; and

(b) to call witness in his defence, and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."

The record of appeal at page 17 reveals thus:

"Ruling

This is a ruling upon the prima facie case, having gone through the evidence adduced by the prosecution side, the case has been made to require the accused person to make his defence u/s 231 of CPA, CAP 20 R.E. 2002.

Court- *Defence rights explained to the accused person.*

Accused- *I will make my defence by oath.*

Witnesses: *Athuman Issa, Issa, Mariamu Kazimoto, Salehe, Tabu Shabani, Bwanga, Amina.*

That's all.

Exhibits- *nil."*

Therefore, according to the record, the trial court sufficiently explained the rights of defence to the appellant, that is why he informed the court that he would give his defence on oath and call witnesses on his behalf. The appellant gave his evidence to answer the offences charged, called two witnesses among the listed ones and prayed to close his defence case on 6th August, 2019.

In the third ground of appeal, the appellant contends that the two courts below did not consider his defence of *alibi.* He averred that at the material time he was at home and upon information of the incident, he was among the people who assisted to look for the assailant, hence he could not have been the one who committed the offence given the fact that the scene of crime is far away from the village.

Responding, the learned State Attorney argued that, the High Court dealt with the appellant's defence and even if it was not sufficiently considered, this Court has mandate to step into the shoes of the High Court and consider that defence.

Having perused the record of appeal, it is clear that the trial court did not consider the defence evidence. On its part, the High Court only considered the defence of the appellant in relation to the claim that this case was fabricated by his aunt and PW4 due to land dispute between them (page 66 of the record of appeal). The High Court did not consider the defence of *alibi.* Section 194 (4) (5) and (6) of the CPA provides for conditions where the accused intends to rely on the defence of *alibi* thus:

> *"194.- (4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case.*
>
> *(5) Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed.*
>
> *(6) If the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence.*

According to this provision, whenever the accused intends to rely on the defence of *alibi,* he should serve a notice to that effect to the court and the prosecution before the hearing of the case and if he fails to do

so, he shall furnish the particulars of the *alibi* to the prosecution at any time before the case for the prosecution is closed. However, even if the accused fails to furnish such particulars, the court may in its discretion, accord no weight to such defence.

Now, in this case, the appellant did not give notice of his intention to rely on the defence of *alibi* and did not furnish the prosecution with the particulars of such defence before it closed its case. However, even though the trial court had discretion not to accord any weight to the defence of *alibi*, it was not authorized to treat it as if it was never made consistent with our decision in **Mwita s/o Mhere & Ibrahim Mhere v. R** [2005] T.L.R. 107 where it was held thus:

> *"Where a defence of alibi is given after the prosecution has closed its case, and without any prior notice that such a defence would be relied upon, at least three things are important under the provisions of section 194 (6) of the Criminal Procedure Act 1985:*
>
> *(a) the trial court is not authorized by the provision to treat the defence of alibi like it was never made,*
> *(b) the trial court has to take cognizance of that defence, and*
> (c) *it may exercise its discretion to accord no weight to the defence."*

See also **Yusuph Seleman @ Nduwa v. R,** Criminal Appeal No. 260 of 2020 (unreported).

We agree with the learned State Attorney that this Court can step into the shoes of the High Court and consider that defence [see for instance the case of **Julius Josephat** (supra)]. We shall thus consider that defence in the course of this judgment.

Mr. Kusekwa argued further that because the appellant was identified as the perpetrator of the offence, his defence of *alibi* dies naturally. We shall come to the issue of identification of the appellant shortly.

The issue of visual identification is the appellant's complaint in the fourth ground of appeal. The appellant argued that the complainant and her siblings did not mention the name of the suspect immediately following the incident. That, it is not known where PW4 got the appellant's name because the identifying witnesses did not say they mentioned that name to her. He argued further that PW1 said in her evidence that it was PW2 who saw the suspect before that person pulled her into the bush and more so as PW1 said, the perpetrator pulled her skirt over her head when he was raping her which connotes that she did not properly see the rapist.

Countering the appellant's submission, the learned State Attorney argued that PW1, PW2 and PW3 identified the appellant at the scene and described his attire as he had put on black shorts and the incident took about fifteen minutes which was sufficient to identify the culprit. Relying on the case of **Marwa Wangiti & Another v. R** [2002] T.L.R. 29, he argued further that, PW1 mentioned the appellant to PW4 shortly thereafter. Mr. Kusekwa contended that the conditions for identification were sufficient and met the criterion enunciated in the case of **Waziri Amani v. R** [1980] T.L.R. 250.

To determine this matter, we wish to state the law regarding visual identification. The legal principles regarding the evidence of visual identification as have been discussed by the Court in its various decisions, include; **one,** such evidence is of the weakest kind and most unreliable and should be acted upon cautiously after the court is satisfied that the evidence is watertight, and all possibilities of mistaken identity are eliminated. **Two,** even if it is evidence of recognition that evidence must be watertight. In that regard, where the offence is committed at night, and the question of light is in issue, there must be clear evidence as to the intensity of the said light and that bare assertions, would not do. **Three,** in matters of identification, conditions for identification alone, however ideal they may appear are no guarantee for untruthful evidence.

(See **John Jacob v. R,** Criminal Appeal No. 92 of 2009; **Daniel s/o Paul @ Meja v. R,** Criminal Appeal No. 307 of 2016; and **Hamisi Hussein & Others v. R,** Criminal Appeal No. 86 of 2009 (all unreported).

Having considered the evidence on record, we have found the evidence of visual identification at the scene of crime wanting for the following reasons: **one,** the three identifying witnesses averred that the suspect came from behind and all took to their heels before PW1 was caught up. PW2 who was behind her siblings ran away hence within such short duration, she could not have sufficiently identified the suspect. After all, she did not say that she had time to observe him. **Two,** PW1 said it was PW2 who saw the suspect before he pulled her hijab and drugged her into the bush. Also, she said that when the suspect raped her, he pulled her skirt over her head and did not say if the skirt was released before the incident was cut short and the suspect ran away on hearing people approach them. **Three,** PW1 did not say she mentioned the appellant's name to the people who came to rescue her at the scene. She did not even disclose the villagers who came at the scene. Neither of these witnesses said they mentioned the appellant to PW4. At most, the three identifying witnesses pointed the appellant in court without even mentioning his name.

According to our previous decisions, delay to mention a suspect dents a witness's credibility. For instance, in the case of **Marwa Wangiti & Another v. R** [2002] T.L.R. 39, the Court held that:

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-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 also **Lameck Bazil & Another v. R,** Criminal Appeal No. 479 of 2016 and **Daud Rashid v. R,** Criminal Appeal No. 97 of 2020 (both unreported).

Further, the identifying witnesses averred that they knew the appellant before, meaning that, their identification was by recognition. However, because we have said herein above that the witnesses could not have identified the suspect given the prevailing conditions at the scene, it cannot be said that they positively recognized him to be the rapist. In the case of **Hamisi Hussein** (supra), the Court observed that:

> *"We wish to stress that even in recognition cases when such evidence may be more reliable than identification of a stranger, clear evidence on sources of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize*

someone he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."

Therefore, since the appellant was not positively identified at the scene of crime, his defence of *alibi* to the effect that he was at home at the material time, holds water.

The fifth ground is closely related to the preceding ground. It is about contradiction on the prosecution evidence. It is not disputed that while PW1 and PW2 said the suspect was wearing black shorts but did not say the colour of his shirt; PW3 said he had black shirt but did not say which colour his shorts or trousers had. This contradiction is not minor as the learned State Attorney wanted us to hold. The contradiction goes to the root of the case which adds up to our doubt that the witnesses did not identify the assailant and it creates doubt to the prosecution case which is resolved in favour of the appellant.

The last ground is whether the prosecution proved the case against the appellant beyond reasonable doubt. In a criminal case, the burden of proof is on the prosecution to prove the case against the appellant and it never shifts to the accused person (section 3 (2) of the Evidence Act [CAP. 6 R.E. 2019]). Therefore, from what we have discussed in the preceding grounds, it is clear that the prosecution did not prove the case against the appellant as required in law.

Consequently, the appeal has merit and we hereby allow it, quash the conviction and set aside the sentences meted out against the appellant. We thus order the appellant's immediate release from custody unless his continued incarceration is related to other lawful cause.

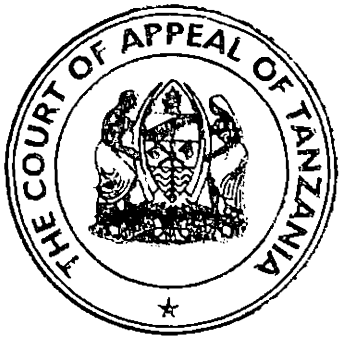
DATED at **TANGA** this 10th day of May, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered this 11th day of May, 2022 in the presence of Mr. Hassan Shabani @ Ugoya, the Appellant in person and Mr. Paul Kusekwa, State Attorney for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL