IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., KEREFU, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 64 OF 2018

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

DANIEL WASONGA ..... RESPONDENT

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

(De-Mello, J.)

dated the 19th day of February, 2018
in
Criminal Appeal No. 227 of 2017

.....

JUDGMENT OF THE COURT

8th & 12th July, 2022

KIHWELO, J.A.:

The Director of Public Prosecutions, the appellant herein preferred charges against the respondent before the District Court of Musoma at Musoma for the offence of rape contrary to sections 130 (1) (2) (e) and 131 (1) of the Penal Code (Cap. 16 R.E. 2002; now R.E. 2022) (the Penal Code). It was the case for the prosecution that, on 13.06.2016 at Songe area within the District and Municipality of Musoma in Mara Region, the respondent, had carnal knowledge a girl aged fourteen years, who we shall henceforth identify her as the victim or PW1, for purposes of

concealing her identity. The respondent maintained his innocence when the charge was put to him.

In order to prove the charges against the respondent, the appellant Republic lined up six prosecution's witnesses to testify namely; the victim (PW1), Agnes Chacha (PW2), Hassan Mohamed (PW3), Venance Malima (PW4), E. 6464 D/Cpl Daudi (PW5) and Dr. Regina Bernard Msonge (PW6). The evidence of the prosecution witnesses, was supplemented by one documentary evidence, the PF3 of PW1 (exhibit P1). On his part in defence, the respondent relied on his own sworn testimony, he neither called any witness to beef up his defence nor tender any documentary exhibit.

The learned trial Magistrate after considering the evidence placed before the trial court, was impressed by the prosecution and found that the case against the respondent was proved to the hilt. The respondent, was therefore convicted as charged and accordingly he was sentenced to the mandatory term of thirty years imprisonment plus 24 strokes of the cane.

Aggrieved by that decision, the respondent appealed to the High Court of Tanzania at Mwanza in Criminal Appeal No. 227 of 2018. The High Court (De-Mello, J) upon hearing the appeal on merit, she came to the conclusion that before the, trial court, the prosecution did not prove

its case to the hilt and therefore, she quashed the conviction, set aside the sentence and released the respondent at liberty. Unamused, by the decision of the High Court, the appellant has come to this Court seeking to overturn the decision of the High Court which set free the respondent.

The brief background of this matter leading to the instant appeal is better told by the prosecution's witnesses. PW1, who is the victim of the crime of rape, on the material date during a broad daylight while at home attending to some routine chores, she was visited by an uninvited guest, the respondent, who after a short while extended a gesture of invitation to her so that she can escort him to his house but at first, the respondent was patient enough to wait for the victim to finish washing dishes before they left to his house. Upon arrival at his house, the respondent further requested the victim to accompany him to the nearby bush to collect some traditional medicine and the victim innocently and unaware of what was about to happen, unreservedly agreed to the invitation to accompany the respondent to the said bush. The duo walked together to the bush and when they were at the deserted part of the house and far away from the victim's home, the respondent exhibited his dark desires by forcefully undressing the victim who remained naked, pushed her on the ground, undressed himself and inserted his male organ into the victim's private parts something which caused severe pain and agony to the victim. After

ejaculation the respondent ordered the victim to put on her clothes and promised her that he would offer her TZS 1,000.00 which he did not honour though. A little bit later the respondent then told the victim to go back home.

Upon her arrival back home, PW1 reported to one Mama Frank, their neighbour about the rape incident and that the respondent was the perpetrator, whereby, Mama Frank instantly relayed the information to PW2 who also reported the incident to their mother and the street chairman, PW3. Apparently, earlier on, PW2 while leaving to run her errands, met the respondent when he was coming to visit their place but did not bother to entertain any doubts because he was someone familiar to them and was a regular visitor to their house.

Mama Frank took the victim to PW2 who was in town and upon their arrival, PW2 who noticed that the victim was limping while walking, she inquired as to what had befallen her and the victim graphically described the ordeal she endured and mentioned the respondent as the perpetrator. They then left back home and on the following day PW3 visited the victim's home where they narrated to PW3 the entire incident and the matter was then reported to Musoma Central Police and PW5 was assigned to investigate the alleged crime. On the other hand, PW6 a

Clinical Officer, medically examined the victim and found out that she had no hymen. She then filled the PF3 (exhibit P1).

On the other hand, PW3 who was living within the same house with the respondent as co-tenants, testified to the effect that on the fateful day he saw the respondent and the victim who were going to the nearby bush and, in fact he even took trouble to ask the respondent why did he want to take the victim to the bush, but the respondent insistently left with the victim and that they stayed in the bush for quite long and the respondent was seen coming back at 16:00 hrs.

In his sworn defence testimony, the respondent gallantly distanced himself from the accusations made against him by the prosecution. He invited the trial court to disregard the prosecution evidence alleging that PW1 and PW2 were familiar to him and they are good friends to him but there was no love relationship between him and the victim. However, the respondent went on to allege that he had bad blood with PW3 who had grudges with him. All in all, the respondent did not offer further details on the reason for the bad blood between the duo. He therefore, beseeched the trial court to disregard the evidence of the prosecution for being full of lies and distortions.

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. However, that verdict was overturned by the High Court.

Aggrieved by the decision of the High Court, the appellant has fronted two (2) grounds of appeal which can be paraphrased as hereunder:

1. *That the learned High Court Judge erred in holding that the prosecution evidence on visual identification was not watertight.*
2. *That the learned High Court Judge erred in holding that the conviction by the trial Magistrate was improper.*

At the hearing of the appeal, the appellant Republic was represented by Ms. Mwamini Yoram Fyeregete, learned Senior State Attorney whereas the respondent was absent despite being served through substituted service by publication in Mwananchi Newspaper of 29.06.2022. Ms. Mwamini prayed in terms of rule 80 (6) of the Tanzania Court of Appeal Rules, 2009 and was granted leave to proceed with hearing of the appeal in the absence of the respondent who was dully served.

When the appellant was invited to expound her appeal, she in the first place prayed to adopt the memorandum of appeal and then prefaced her oral argument by contending that the respondent was convicted and sentenced by the trial court to serve the mandatory term of thirty years plus 24 strokes of the cane. However, his appeal to the High Court was

successful as the conviction was quashed, sentence set aside and he was set free for the reasons which the High Court Judge assigned at pages 60 and 61 of the record of appeal, specifically referring to visual identification which the trial Judge found out not to be watertight and also because the victim delayed to be taken to the hospital for medical examination.

The learned Senior State Attorney began by arguing the first ground in support of the appeal and contended that the prosecution ably managed to prove beyond any shadow of doubt that the respondent was identified by PW1. To support her proposition, she referred us to pages 10, 11 and 12 of the record of appeal. Illustrating, she argued that, PW1 testified that the respondent went to her on the fateful day in a broad day light and they left together around noon. The learned Senior State Attorney, submitted further that the respondent was not a stranger to the victim as they were living nearby and the respondent occasionally visited the victim's home. She referred us to page 11 of the record of appeal.

In further elaboration, the learned Senior State Attorney argued that the evidence of familiarity of the respondent was also further clarified by PW2 at page 12 of the record of appeal and also admitted by the respondent himself during his defence testimony at page 34 of the record of appeal. The issue of visual identification was further clarified by the fact that the respondent and the victim spent quite sometimes together

and this is evident from the testimony of PW1, PW2 as well as PW4, the learned Senior State Attorney argued. On the basis of the foregoing evidence, the learned Senior State Attorney argued that, under the circumstances, it can safely be said that there was no room for mistaken identity.

As to the complaint regarding failure by the victim to report the matter at the earliest opportune time, the learned Senior State Attorney argued that the issue was promptly reported by PW1 to one Mama Frank who relayed the information to PW2 who then informed PW3. She referred us to pages 11 and 13 of the record of appeal.

The learned Senior State Attorney strongly argued that given the circumstances of this appeal where the incident occurred in a broad day light, the respondent was not a stranger to the victim and in fact the duo spent quite some hours together, there cannot be any possibility for mistaken identity and in her view the guidelines which were developed in the often cited case of **Waziri Amani v. Republic** [1980] TLR 250 were never meant to be exhaustive or conclusive. Reliance was placed in the case of **Kenedy Ivan v. Republic**, Criminal Appeal No. 178 of 2007 (unreported). She then rounded up her submission in support of this ground by arguing that, the first ground has merit.

In relation to the second ground of appeal, the learned Senior State Attorney in her brief and focused oral argument contended that, the trial Magistrate was undeniably right to convict the respondent because the prosecution proved its case beyond reasonable doubt. Illustrating, she referred us to page 10 of the record of appeal where PW1 graphically described how she was brutally raped by the respondent and that this evidence was consistent with the evidence of PW2 found at page 13 of the record of appeal where she described how PW1 was walking while limping. She further argued that, this was also supported by the evidence of PW6 who testified that she medically examined the victim and observed that her private parts had no hymen.

When we inquired on whether exhibit P1 was read out in court upon admission the learned Senior State Attorney was quick to respond that exhibit P1 was not read out in court and that the omission renders it inadmissible in evidence as such, it has to be expunged from the record. However, it was her argument that even if exhibit P1 is expunged from the record, the oral account of PW6 is sufficient to cover the contents of the PF3. The learned Senior State Attorney therefore, entreated us to allow the appeal.

We have anxiously considered the oral arguments of the learned Senior State Attorney in line with the grounds of grievance which were

lodged by the appellant and adopted by this Court and we have come to the conclusion that central to this appeal is whether the prosecution proved the case beyond reasonable doubt.

It is momentous to state that, in our criminal justice system like elsewhere, the burden of proving a charge against an accused person is on the prosecution. This is a universal standard in all criminal trials and the burden never shifts to the accused. As such, it is incumbent on the trial court to direct its mind to the evidence produced by the prosecution in order to establish if the case is made out against an accused person. This principle equally applies to an appellate court which sits to determine a criminal appeal in that regard. In our earlier decision in **Phinias Alexander and Others v. Republic,** Criminal Appeal No. 276 of 2019 we cited with approval the decision in **Jonas Nkize v. Republic** [1992] TLR 214 in which the High Court stated that:

> *"the general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking."*

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 find it convenient to first of all, begin by deliberating on the issue of visual identification which has been challenged by the learned Senior State Attorney in that the learned High Court Judge erred when she held that PW1's evidence of visual identification was not watertight.

We take the law on visual identification in this country to be well settled. In the landmark decision of **Waziri Amani** (supra), the Court at page 252 outlined factors that have to be considered when courts deliberate on visual 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**, the conditions in which such observation occurred for instance, whether it was day or night-time; **Four**, whether there was good or poor lighting at the scene and **five**, whether the witness knew or had seen the accused before or not.

In our considered opinion, we think the learned Senior State Attorney was right in that the incident in question occurred in a broad day light and the respondent was not a stranger to the victim and furthermore the respondent and the victim spent quite sometimes together from the moment the respondent went to visit the victim, waited her to finish washing dishes, walked with her to his home place and then the two walked together to the bush where the respondent raped the victim and told her to go back home.

From the foregoing evaluation of the evidence, we hold that the respondent was not necessarily identified but was recognized by PW1 who knew him as a fellow neighbour. This was clearly a case of recognition rather than identification. It has been observed severally by this Court that, recognition is more satisfactory, more assuring and more reliable than identification of a stranger. See, **Mussa Saguda v. Republic**, Criminal Appeal No. 440 of 2017 (unreported). We are settled in our minds that matters at the trial court were neatly tied up only that the learned High Court Judge did not properly evaluate the evidence on record otherwise she would not have arrived to the conclusions she did. In the circumstances, we find the first ground to have merit.

The above would have sufficed to dispose the appeal but, we are however, obliged to consider, albeit briefly, the second ground of appeal

that the learned High Court Judge erred in holding that the conviction by the trial Magistrate was improper. In our considered opinion this should not detain us much as the answer is not far-fetched.

We will start with exhibit P1 which was clearly not read aloud to the respondent after it was admitted in evidence. Time without number we have held that this is irregular and fatal because it denies the accused the right to understand the nature and substance of the contents of the exhibit and therefore prepare for a proper and effective cross examination as well as defence. The interest of justice and fair trial demands that any exhibit tendered and admitted in evidence has to be read aloud in court after clearance for admission. This position was adopted in the case of **Jumanne Mohamed and Others v. Republic**, Criminal Appeal No. 534 of 2015 (unreported). In the circumstances above and for the reasons stated, we accordingly expunge exhibit P1 from the record.

As to the consequences that may befall following the expunging of exhibit P1, we think as rightly argued by the learned Senior State Attorney, this did not affect the entire prosecution case bearing in mind that the oral account of PW6 is quite sufficient to cover the contents of the PF3. In addition, PW1 was the prosecution star witness whose evidence was very damaging to the respondent, apart from the cogent and credible evidence of other prosecution witnesses. It is a peremptory

principle of law that the best evidence of sexual offence comes from the victim. See, for instance, **Magai Manyama v. Republic**, Criminal Appeal No. 198 of 2014 and **John Martin @ Marwa v Republic**, Criminal Appeal No. 22 of 2008 (all unreported). In this case PW1 graphically described how she was raped by the respondent in the fateful day while ably explaining in minute detail how the incident occurred.

In our evaluation of the evidence as a whole we are satisfied as the trial court did, that the prosecution proved its case beyond reasonable doubt. We wish to state that the argument that the victim delayed to be taken to the hospital cannot benefit the respondent on the strength of the evidence of PW1 and other prosecution witnesses. In the case of **Magendo Paul & Another** (supra) we quoted a passage from Lord Denning in **Miller v. Minister of Pension** (1947) 2 All ER 372 in which he stated that:

> *"Remote possibilities in favour of the accused cannot be allowed to benefit him. If we may add fanciful possibilities are limitless and it would be disastrous for the administration of criminal justice if they were permitted to displace solid evidence or dislodge irresistible inferences."*

In our case at hand, delay to take the victim to hospital, should not be permitted to displace solid evidence of PW1 who described in minute details how the respondent committed the heinous act.

Furthermore, we have considered the alleged minor contradiction between the testimony of PW1 and PW4 on the exact time when the respondent left with the victim. It is true, as observed by the High Court Judge, PW1 at page 10 of the record of appeal testified that, the respondent went to their house in the afternoon while PW4 at page 19 said that the victim went at 10:00am. Clearly this is a contradiction, however, in our view this contradiction is very minor and does not go to the root of the matter. In the case of **Said Ally Ismail v. Republic**, Criminal Appeal No. 242 of 2010 (unreported) in which the Court was faced with analogous situation, we held that:

> *"Contradictions by witness or between witnesses is something which cannot be avoided in any particular case."*

We note that, there may have been some confusion between PW1 and PW4 as to what time exactly PW1 went to the house where the respondent and PW4 are co-tenants. But the evidence is very clear that the respondent took the victim to the nearby bush where he raped her. We are alive to the fact that due to frailty of human memory a witness is not expected to be accurate in minute details when retelling his story and

more in particular if the matter is on details. See, for instance **Evarist Kachembeho and Others v. Republic** [1978] LRT 70 and **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1999 (unreported). In our view, this discrepancy is very minor and does not go to the root of the matter and therefore it can be glossed over.

In the final event, in our evaluation of the evidence as a whole, we are satisfied that this appeal has merit. We hereby allow it, quash and set aside the decision of the High Court in Criminal Appeal No. 227 of 2017.

DATED at **MWANZA** this 11th day of July, 2022

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 12th day of July, 2022 in the presence of Deogratius Richard Rumanyika, learned State Attorney for the appellant/Republic and in the absence of respondent is hereby certified as true copy of the original.

THE COURT OF APPEAL OF TANZANIA

H. P. Ndesamburo
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL