IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 514 OF 2017

FRIDAY MBWIGA @ KAMETA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Court of the Resident Magistrate of Mbeya, at Mbeya)

(Herbert, SRM Ext. Juris.)

dated the 14th day of November, 2017
in
Criminal Appeal No. 27 of 2017

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JUDGMENT OF THE COURT

26th & 30th September, 2022

MWAMBEGELE, J.A.:

In the Court of the Resident Magistrate of Mbeya, the appellant Friday Mbwiga @ Kameta was arraigned for gang rape contrary to section 131A (1) of the Penal Code, Cap. 16 of the Revised Edition, 2002 (now Revised Edition, 2022). He was convicted and sentenced to life imprisonment. His first appeal to the High Court, where it was transferred to the Court of the Resident Magistrate of Mbeya in terms of section 45 (1) of the Magistrates' Courts Act, Cap. 11 of the Revised Edition, 2002 (now Revised Edition, 2022), was barren of fruit, for Herbert, SRM (Ext. Juris) dismissed it entirely

on 14.11.2017. The appellant was aggrieved. He thus lodged this second appeal to the Court on twelve grounds of complaint. However, when this appeal was placed before us on 26.09.2022 for hearing, the appellant sought leave of the Court, and was granted, to withdraw ground seven of the appeal which hinged on the challenge of the cautioned statement he allegedly made before the police.

Before proceeding further, we find it apt to briefly state the background facts leading to the appellant's arraignment. These are greatly told by the victim herself. The victim was a student of Itende High School in the City of Mbeya. She lived at Airport area also within the City of Mbeya. On 19.12.2015 at around 19:00 hours, she was on her way home from Sido Area. Immediately after crossing the Old Airport, she met three young men, one of them, allegedly the appellant, had a bicycle. The three young men demanded money from her but the victim had none. The trio called other four young men who joined them in harassing the victim and demanding money in the process. Thereafter, having failed to get money from her, they tore her clothes, undressed her undergarments and raped her in turns. They also carnally knew her against the order of nature. After they were done with the heinous act, the appellant took her mobile phone and told the victim to be sending money through that cell phone number.

After the ordeal, they dispersed at about 22:30 and the victim proceeded home where she took some pain killers and slept.

On the following day; that is, 20.12.2015, the victim went to Mbeya Regional Hospital where Dr. Rainfrid Kassimu Chombo (PW4) medically examined her and filled the relevant PF3 which was admitted in evidence as Exh. P3. Exh. P3 shows that there were bruises in the victim's vagina and anus signifying that she was raped and carnally known against the order of nature.

On 25.12.2015, a person who identified himself by only one name of Imma, called the victim. He asked her to meet so that they could make love. They were in touch conversing over the phone ever since. They could not meet until 06.01.2016, when they agreed to meet at City Pub. The victim allegedly identified the voice of the appellant as that of one of the young men who committed the atrocious act to her on 20.12.2015 and reported to the police. The police set a trap. She went to City Pub with Amani Kinanasi (PW5), a militiaman, and arrested the appellant. Subsequently, the appellant was arraigned before the trial court.

In defence, the appellant dissociated with the charge levelled against him. The trial court having been satisfied that the offence of gang rape was

proved beyond reasonable doubt, found him guilty as charged, convicted and sentenced him as alluded to above.

At the hearing, the appellant appeared in person, unrepresented. The respondent Republic appeared through Mr. Deusdedit Rwegira, learned Senior State Attorney. When we gave audience to the appellant to argue his appeal, he opted to adopt the remaining eleven grounds in the memorandum of appeal and asked the Senior State Attorney to respond to the grounds of appeal first. He, however, reserved his right of rejoinder in case that need would arise.

Responding, Mr. Rwegira was initially minded to support the appellant's conviction and sentence. However, after a mature reflection amidst his submissions, he changed the goal posts and supported the appellant's appeal. He premised his support on weak visual identification evidence. He submitted that the offence was committed at night and the material conditions obtaining at the scene of crime were not favourable for positive identification. He added that given the commotion which obtained at the scene of crime where seven people are alleged to have raped the victim, the condition were not favourable for her to identify the appellant.

In the premises, the possibilities of mistaken identity cannot be eliminated, he argued.

Given the response of the respondent Republic, the appellant had nothing useful to add in rejoinder. He simply supported the learned Senior State Attorney's submissions and prayed to be set free by allowing his appeal as prayed in the memorandum of appeal.

We have considered the arguments of the learned Senior State Attorney in response to the grounds of appeal as well as the appellant's grounds of appeal. This appeal stands or falls on the evidence of visual identification. The law on this aspect is settled. In the oft-cited **Waziri Amani v. Republic** [1980] T.L.R. 250 this Court held:

> *"... evidence of visual identification; as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual identification* ***unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.****"*
> [Emphasis supplied].

The Court stated further:

"Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. ***We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not.*** *These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."*

[Emphasis ours]

Likewise, in **Raymond Francis v. Republic** [1994] T.L.R. 100 at 103, where the Court stated:

"It is elementary that in criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of utmost importance."

Similarly, this Court in **Ambwene Lusajo v. Republic** Criminal Appeal No. 461 of 2018 (unreported) citing its earlier decision in the case of **Cosmas Chaula v. Republic,** Criminal Appeal No. 6 of 2010 (unreported) held:

"A witness who alleges to have identified a suspect at the scene of crime is required to give detailed description of such as suspect to a person to whom he first report the matter to him or her before such suspect is arrested. The description should be on attire worn by the suspect, his appearance, height, colour, and/or any special mark on the body of such a suspect".

Applying the above principle of law to the case at hand, it is undisputed that the victim who is the identifying witness claims to have identified the appellant at 19:00 hours and that there was enough light. We get difficulties in believing the victim that she was able to identify the appellant at that hour and in the circumstances obtaining there during the commission of the offence. We say so because the appellant was a

stranger to her and no identification parade was carried out to identify him. The appellant was arrested on allegedly the claim of the victim that she identified his voice in their phone conversation that it was the very voice that she heard during the rape incident. We have serious doubts if the victim could have identified the voice of the appellant through the phone call who she had never met before the incident. In **Nuhu Selemani v. Republic** [1984] T.L.R. 93 at page 94, we made an observation that voice identification by itself is not very reliable. Likewise, in **Mohamed Musero v. Republic** [1993] T.L.R. 290, at page 293 we stated:

> *"With regard to the voice this was also most unreliable in the circumstances of this case. There was not much exchange of words in this confused atmosphere, only one word 'tulia' seems to have been uttered and possibly another two lete pesa' when the bandits were demanding money.* ***This to us appears insufficient to enable the witnesses to make a clear identification based on*** **voice."**
>
> [Emphasis supplied].

In the case at hand, as observed above, we do not think the victim could have identified the appellant's voice through a cellphone conversation

as resembling that of one of the persons who ravished her. We entertain this doubt in favour of the appellant.

As an extension to the above arguments, if the victim identified the voice of the appellant through the cellphone phone conversation, she would have said so when reporting the matter to the police before going to City Pub. Lucina William Mbuya (PW4), a police officer who was assigned to investigate the case and before whom the victim reported that the appellant was at City Pub, testified as appearing at p. 51 of the record of appeal, that:

> *"She further told me that after three days she received a call from one person who introduced to her as Imma and that the said person wanted to have a love affair with her. The said Imma told her to meet at City Pub."*

Likewise, on the same point, PW5, a militiaman who arrested the appellant, testified as appearing at p. 57 of the record of appeal, that:

> *"On 06.01.2016 at about 4pm, I was at Mwanjelwa Police Post. On that date, sister came there with an RB. The sister reported to my in-charge that she received a call from an unknown person who told her that he was at City Pub. My in-charge sent me to go with the said sister ...."*

It is obvious from the above two excerpts that the victim reported to PW4 and PW5 that there was a person who called her to meet at City Pub so that they could make love. That person was unknown to her. This makes us increasingly of the view that the victim did not identify the voice of the appellant as that of one of the persons she claims to have identified at the *locus in quo*. Had she identified that the one who wanted to make love with her is the one she claimed to have identified at the scene of crime, she would not have hesitated to say so at the police station before PW4 and PW5. On the facts before us, the appellant was arrested for making amorous advances at the victim and not for his voice being identified as being that of one of the ravishers of the victim.

As if the foregoing is not enough, the cautioned statement of the appellant which was taken by No. F.5639 D/C Goodluck (PW2) and admitted in evidence as Exh. P1, cannot rescue the situation either, for two main reasons. **First**, it does not incriminate the appellant to the offence charged; and **secondly**, it was wrongly received in evidence inasmuch as it was taken by PW2 in the presence of another police officer, WP 9841 D/C Yusta. At p. 31 D/C Yusta testified during inquiry that she was present in the room where the cautioned statement was being recorded, continuing with her duties. She reiterated it at p. 32 during cross-examination. We have

pronounced ourselves in a number of our decisions that where, like here, a statement of an accused person is recorded in the presence of another police officer or other police officers, that statement is inadmissible in evidence – see: **Charles Issa @ Chile v. Republic**, Criminal Appeal No. 97 of 2019, an unreported decision we have rendered in the ongoing sessions of the Court here at Mbeya and **Kisonga Ahmad Issa and Another v. Republic**, Criminal Appeal No. 362 of 2017 and **Bakari Ahmed @ Nakamo and Another v. Republic**, Criminal Appeal No. 74 of 2019 (both unreported); our decisions cited therein and **The Director of Public Prosecutions v. Rehema Omary Abdul & others**, Criminal Appeal No. 57 of 2019 (unreported). In **Charles Issa @ Chile** (supra), confronting an akin situation, we reproduced the following excerpt from **Kisonga Ahmad Issa** (supra):

> *"It is further noted that the cautioned statement of the 1st appellant was recorded by PW1 in the presence of the other police officers. That was yet another irregularity, as the right of privacy to the 1st appellant was infringed. We therefore, find merit on this ground of appeal and expunge all confessional statements from the record."*

In the same case, we reproduced the following observation we made in **Bakari Ahmad @ Nakamo** (supra):

> *"Indeed PW1 and PW2 who recorded the statements of the 1st and 2nd appellant did so while other police officers were also present in the same room, (pages 46 and 64 lines 18-19 and 4-5 respectively). It is our firm conviction that, the action of recording the appellants' statements in the presence of other police officers has prejudiced the appellants in two ways: First; it cannot be ruled out that the appellants were not free agents when recording their statements. Secondly; the appellants' right to privacy was infringed. The effect of both shortcomings is to have the respective statement expunged from the record."*

We are guided by the positions we took in the above cases. In the case at hand, it is no gainsaying that PW2 recorded the cautioned statement of the appellant in the presence of another police officer. On the authority of the above previous decisions of the Court, Exh. P1 was inadmissible and wrongly admitted in evidence. It is expunged from the record.

And to clinch it all, the plausibility of the statement of the victim to the effect that the appellant took his phone leaves a lot to be desired. We think

it is not humanly possible for a person who participated in a gang rape to take a cell phone of the victim and order the victim to be sending money through that victim's number. After all, if it were true, the victim could have easily reported the information to the police who could have easily trapped the appellant by sending money. We highly doubt if the victim spoke the truth on this aspect. Our criminal jurisprudence requires us to resolve such doubt in favour of the appellant. We are attracted by the appellant's story to the effect that he was given the number by his friend named Kelvin. We take judicial notice that 25.12.2015 was a Christmas during which many young men like the appellant get involved in merrymaking. The appellant might have miscalculated his merrymaking by thinking to involve a stranger in his merrymaking. That mistake has costed him close to seven years behind bars. Quite a lesson indeed.

In view of the above, given that we have found and held that the identification of the appellant was not watertight, that the cautioned statement was inadmissible in evidence coupled with the incredibility and unreliability of the victim, the remaining evidence of evidence will not be sufficient to prove the case against the appellant to the hilt. It is elementary law that in criminal cases like this one, the standard of proof is

beyond reasonable doubt. The remaining evidence, we are afraid, cannot meet this threshold.

The sum total of the foregoing discussion is that we find merit in this appeal and allow it. We consequently quash the judgment and conviction of the trial court and that of the first appellate court and set aside the sentence imposed on the appellant. We order that the appellant Friday Mbwiga @ Kameta be released from prison forthwith unless held there for some other lawful cause.

DATED at **MBEYA** this 29th day of September, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered on this 30th day of September 2022 in the presence of the appellant in person and Ms. Rosemary Mgenyi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL