IN THE COURT OF APPEAL OF TANZANIA
AT TABORA
(CORAM: KOROSSO, J.A., GALEBA, J.A. And MWAMPASHI, J.A.)
CRIMINAL APPEAL NO. 200 OF 2019
MAJUTO NDUNDUGURU.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Tabora)
(Mruma, J)
dated the 25th day of April, 2019
in
Criminal Appeal No. 100 of 2018
.....

JUDGMENT OF THE COURT

02nd & 9th November, 2022

MWAMPASHI, J.A.:

In the District Court of Kasulu at Kasulu (the trial Court), the appellant Majuto s/o Ndunduguru was charged and convicted of the offence of rape contrary to sections 130 (1), (2) (e) and 131(1), both of the Penal Code [Cap 16 R.E. 2002, now R.E. 2022] (the Penal Code]. It was alleged that on 28.04.2017 at about 20:00 hours at Mhunga Village within the District of Kasulu in Kigoma Region, the appellant had carnal knowledge of 'A.S' a girl aged nine (9) years (her name withheld to hide her identity) who will hereinafter be referred to as the victim or PW1).

Having convicted the appellant, the trial court sentenced him to life imprisonment. In the first appeal to the High Court, while the appellant's appeal against the conviction was unsuccessful, the life imprisonment sentence imposed on him by the trial court, was reduced to thirty years

imprisonment. Undaunted and still aggrieved, the appellant has preferred the instant second appeal against both the conviction and sentence.

In its endeavour to prove its case against the appellant, the prosecution tendered one exhibit, that is, a PF3, and paraded a total of five witnesses whose evidence, in brief, was to the following effect; The appellant and PW1 were neighbours. On the material date at around 20:00 hours, PW1's mother, one Esther Boniface (PW3), sent PW1 to the market. On her way, PW1 met the appellant, who grabbed and pulled her aside into a farm and raped her. PW1's cousin, Boniphace Elias (PW2) who was on his way to the flour milling machine, claimed to have witnessed the incident. According to him, after seeing PW1 being raped he rushed back home and reported it to PW3. When PW3 arrived at the scene, that is, in the farm, she found her daughter, PW1, lying on grasses and bleeding. While according to PW3 the place was illuminated by solar light, the evidence from PW1 and PW2 was to the effect that the place was illuminated by sun light.

The prosecution's further evidence was to the effect that PW3 took PW1 to Kasulu hospital where she was examined by Dr. Festo Michel (PW4) who observed that PW1's vagina was open, reddish and had bruises leading him to conclude that PW1 had been raped. A PF3 which was filled by him on 16.05.2017 was tendered and admitted in evidence as exhibit R1. PW3's further evidence was to the effect that the appellant was arrested at his house by local militia men to whom the incident had

been reported. The evidence from the case investigation officer WP 192 DC Siwema of Kasulu Police Station was simply that after the case had been assigned to her on 01.05.2017, she interrogated witnesses and took PW1 to the hospital.

In his sworn defence, the appellant totally denied to have raped PW1. He told the trial Court that on the material evening at about 22:00 hours, he was arrested at his house where he had been sleeping on accusations that he had raped PW1. From his house he was taken to the Village Executive Officer (VEO) office where he was locked up until the following day when he was taken and remanded at Kasulu Police Station for three days before being arraigned before the trial court. The appellant criticized the prosecution evidence contending that it was fabricated and also that the prosecution witnesses gave contradictory evidence.

In finding the case proved, the trial court found that PW1 and PW2 positively identified the appellant at the scene of crime by recognition. The High Court affirmed the findings by the trial court. It was, among other things, observed by the High Court, that when PW1 and PW2 testified that they recognised the appellant at the scene of crime because the sun was shining all they meant was that what was shining was the moon and not the sun. As we have alluded to earlier, only part of the appellant's appeal on sentence was allowed by the High Court whereby the life imprisonment was reduced to thirty years imprisonment, the reason being that the prosecution led no evidence to prove that PW1 was really below 10 years.

The following five (5) grounds of appeal have been raised by the appellant in support of his appeal:

1. That, there was no connection between how the appellant was arrested and the commission of the offence since the person who arrested the appellant was not summoned in court to testify.

2. That, there was misdirection in the assessment of evidence by the two courts below that the appellant was positively identified at the scene of crime by both PW1 and PW2 in that;

(i) Both witnesses did not describe the appellant to PW3, the next immediate person in the aftermath of the incident.

(ii) The circumstances obtaining at the scene of crime and its precincts did not allow accurate identification of the appellant by the two witnesses.

3. That, the issue of the PF3 (exhibit RI) being filled nearly three weeks after the alleged medical examination was not properly resolved by the first appellate court.

4. That, the learned High Court Judge erred for creating words and inserting them into the body of the evidence by PW1 and PW2 as regards the source and intensity of light.

5. That, both PW1 and PW2 being children of tender age did not promise to tell the truth to the trial court at the time they testified in

court as witnesses as required by section 127 (2) of the Evidence Act, Cap 6 as amended by the written Law (Misc. Amendment) Act, No. 4 of 2016.

At the hearing of the appeal, the appellant appeared in person, unrepresented whilst the respondent Republic was represented by Misses Mwamini Yoram Fyeregete and Sabina Silayo, both leaned Senior State Attorneys.

When invited to argue his grounds of appeal, the appellant preferred to let the learned State Attorneys to responds to the ground of appeal first. He however, retained his right in rejoinder would such need arise.

Ms. Fyeregete began by pointing out that grounds 1, 3 and 5 in the memorandum of appeal are new as they were not raised before the first appellate court. She further argued that unlike ground 5 which is on a point of law, grounds 1 and 3 besides being new grounds, are also based on factual complaints. It was her contention therefore, that while the Court has no jurisdiction to entertain grounds 1 and 3, ground 5 can be entertained because it is on a point of law.

Understandably, the appellant being a layman, there was nothing of substance from him in response to the issue raised by Ms. Fyeregete.

At this very stage, we find it apposite to first determine the issue raised by Ms. Fyeregete as regards to grounds 1, 3 and 5 of the appeal. At

the outset, we agree with Ms. Fyeregete that grounds 1 and 3 are based on factual complaints and that they were not raised and addressed by the first appellate before being brought before this Court. It is trite under section 4 (1) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019] (the AJA), that the Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and from subordinate courts with extended jurisdiction. Further under section 6 (7) of the AJA), the jurisdiction of this Court in second appeal is limited to determining appeals raising points of law only.

In the instant appeal, it is not only clear that grounds 1 and 3 were not raised before the first appellate court, but they also do not raise points of law. For that reason, we decline to entertain them for lack of jurisdiction. In so declining, we are fortified by many decisions of this Court including **Mohamed Musero v. Republic** [1993] T.L.R. 290, **Elias Mwangoka @ Kingloli v. Republic**, Criminal Appeal No. 96 of 2019, **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015 and **Omary Saimon v. Republic**, Criminal Appeal No. 358 of 2016 (all unreported).

In the same vein, we also agree with Ms. Fyeregete that since ground 5, though being new, is on a point of law regarding the application of section 127 (2) of the Evidence Act, [Cap 6 R.E. 2022] (the Evidence Act), then the Court has jurisdiction to determine it.

Ms. Fyeregete, who had earlier expressed her position that she is not supporting the appeal, conceded that as complained in ground 5 of the appeal, section 127 (2) of the Evidence Act, was contravened. She argued that though the trial court conducted *voire dire* on PW1 and PW2 before their respective unsworn evidence could be recorded, which was not necessary given the current position of the law, the witnesses were not asked to promise to tell the truth and not lies as the law requires. Notwithstanding the contravention of section 127 (2) of the Evidence Act, Ms. Fyeregete heavily relied on the decision of the Court in **Wambura Kiginga v. Republic,** Criminal Appeal No. 301 of 2018 (unreported), arguing that, the evidence by PW1 and PW2 was lawful and can be relied upon because in their respective evidence, PW1 and PW2 told nothing but the truth.

Ms. Fyeregete further explained that, PW1 and PW2 told the truth on the aspect that they used to know the appellant well and that he was their neighbour, a fact which was not even denied by the appellant. It was also pointed out by her that, the two witnesses told the truth on the evidence that the appellant grabbed PW1 and pulled her aside into a farm where there was grass, the fact which was supported by PW3 who found PW1 lying on grass in the farm. She therefore insisted that the evidence from PW1 and PW2 was properly acted upon by the trial court in convicting the appellant despite the fact that the same was recorded in contravention of section 127 (2) of the Evidence Act.

As regards ground 2 which is on the complaint that the appellant was not positively identified by PW1 and PW2 at the scene of crime, it was argued by Ms. Fyeregete that the identification of the appellant which was by recognition, as the appellant was well known to the two witnesses, was positive. She contended that before grabbing and pulling aside and raping PW1, the appellant and PW1 conversed for some considerable duration of time which enabled PW1 to properly recognise the appellant. It was further argued by her that although the incident happened at night, according to PW1 and PW2, the scene was well illuminated by moon light. On this argument, Ms. Fyeregete supported the first appellate court conclusion that though it is on record that PW1 and PW2 stated that there was sun light and that the sun was shining, all what they meant was that there was moon light. She insisted that due to their tender age the two witnesses could not differentiate between the sun and the moon. Ms. Fyeregete further insisted that the prevailing condition was favourable for positive identification by recognition.

On the complaint that the learned High Court Judge imported his own suppositions in evidence particularly in regards to his conclusion that the scene was illuminated by moon light while the evidence from PW1 and PW2 was to the effect that it was the sun light which illuminated the scene of crime, it was the stand of Ms. Fyeregete that under the circumstances of the case, the deduction by the High Court Judge was right and logical. Ms. Fyeregete did therefore urge the Court to dismiss

the appeal for being baseless. She insisted that the case against the appellant was proved to the hilt.

In his brief rejoinder, the appellant insisted that the identification evidence by PW1 and PW2 was not positive and watertight because the prevailing condition was not favourable for positive identification. He contended that within the whole village there was no solar energy and therefore PW3's evidence that the scene of crime was illuminated by light from solar energy is not true. The appellant also wondered why if PW1 and PW2 really identified him at the scene of crime, they did not immediately name him to PW3. He thus prayed for his appeal to be allowed.

We propose to begin with ground 5 which is basically on the complaint that the conviction ought not to have been based on the evidence from PW1 and PW2 because the same was taken in contravention of section 127 (2) of the Evidence Act. It is clear and not disputed, as also conceded by Ms. Fyeregete for the respondent, that the evidence from PW1 and PW2 was recorded in contravention of section 127 (2) of the Evidence Act, for the failure by the two witnesses to promise to tell the truth and not tell lies, hence ordinarily, liable for expunction. That being the case, the issue for our determination, basing on the arguments advanced by Ms. Fyeregete on that ground, is narrowly whether, notwithstanding the contravention, the relevant evidence can be rescued

and legalized by section 127 (6) of the Evidence Act as propounded by the Court in **Wambura Kiginga** (supra).

Section 127 (6) of the Evidence Act, provides that:

> *"127 (6) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years or as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth".*

As the Court observed in **Wambura Kiginga** (supra), the import of subsection (6) of section 127 as reproduced above, is that the subsection can be applied and the conviction can be based on it even where other subsections of section 127, including subsection (2), have not been complied with. It should also be emphasized that, in the decision of the above cited case, the Court singled out the following two conditions which must be satisfied where the evidence of a witness of tender age

recorded in contravention of section 127 (2), can be acted and relied upon to found conviction:

1. That there must be clear assessment on record of the credibility of the victim or witness as case may be, and
2. That the court must record reasons that notwithstanding non-compliance with section 127 (2), a witness of tender age still told the truth.

It is therefore clear that, section 127 (6) of the Evidence Act is not an all-weather provision that can be applied in every case to legalise the evidence recorded in contravention of subsection (2) of section 127. As it was stressed by the Court in **Wambura Kiginga** (supra), subsection (6) should be rarely invoked only on exceptional cases. We are also of the settled view that for subsection (6) to be applied, most importantly, it must be satisfied that the author of the relevant evidence told the truth and nothing but the truth. The provisions under that subsection can only come into rescue and legalise such evidence where, in one hand, the evidence is keenly assessed and it is satisfactorily found that it came from a witness who told the truth and, on other hand, where the defence raised appears to be not cogent or plausible or where no defence is raised at all. This takes us to the pertinent issue whether the assessment of the evidence from PW1 and PW2 can lead us to the conclusion that, PW1 and PW2 told nothing but the truth as argued by Ms. Fyeregete.

Our careful assessment of the evidence from PW1 and PW2 does not convince us that PW1 and PW2 met the threshold required for their evidence to be accepted despite being recorded in contravention of section 127 (2) of the Evidence Act. Looking at the evidence the two witnesses gave, it cannot be satisfactorily said that they told nothing but the truth. Firstly, the persistence and concurrent evidence by the two witnesses that the scene of crime was illuminated by sun light leaves a lot to be desired about their truthfulness. We should also note, at this point, that we do not share the High Court deduction and finding to which Ms. Fyeregete subscribed, that when PW1 and PW2 said there was sun light, all they meant was that there was moon light. We do not agree with Ms. Fyeregete that due to their tender age (9 years) PW1 and PW2 could not differentiate between moon light and sun light. We are of the view that the fact that PW1 maintained, even when implored by the prosecutor, that it was the light from sunlight that illuminated the scene of crime, makes the deduction that all they meant was that it was illuminated by moon light, unjustifiable and far-fetched.

We must confess that the evidence from PW1 and PW2 on the aspect that the scene of crime was illuminated by sun light has taxed our minds to a great deal. If we are to agree with the view that the two witnesses could not, due to their age, tell the difference between sun light and moon light, then their capacity and intelligence of comprehending questions put to them and giving rational answers, becomes highly

doubtful. We wonder if the witnesses, who could not differentiate between moon light and sun light, were possessed of sufficient intelligence to justify the reception of their evidence hence competent witnesses. All in all, it is our settled view that based on the above confusion and mixed-up stories as to the source of light and its intensity at the scene of crime, it cannot certainly be said that the two witnesses told nothing but the truth. It should also be borne in mind that contrary to their evidence on that aspect, there is also evidence from PW3 which is to the effect that the scene of crime was illuminated by the light from solar electricity.

Secondly, the reason we find that the evidence given by PW1 and PW2 does not show that the said two witnesses told nothing but the truth for their respective evidence which was taken in contravention of section 127 (2) of the Evidence Act, to be received under section 127 (6), is the fact that while PW1 and PW2 maintained that they positively identified the appellant at the scene of crime, neither of them named the appellant at the earliest opportunity to PW3. There is no evidence on record which is to the effect that PW2 named the appellant to PW3 when he rushed to report to her that PW1 was being raped. Likewise, PW1 did not name the appellant when PW3 got at the scene of crime for her rescue. The failure by the witnesses to name the appellant at the earliest opportunity shook their credibility and reliability.

Based on the above, we thus find that the evidence from PW1 and PW2 which was recorded in contravention of section 127 (2) of the

Evidence Act, cannot be received subsection (6) of section 127 of the Evidence Act as suggested by Ms. Fyeregete and the same does not satisfactorily meet the conditions set by the Court in **Wambura Kiginga** (supra). Consequently, and for the above given reasons, we expunge the evidence given by PW1 and PW2 from the record.

Having expunged the evidence of PW1 and that of PW2 from the record, the remaining evidence is undoubtedly hearsay and insufficient to support the conviction. In other words, our determination of ground 5 of the appeal suffices to dispose of the appeal with no necessity of considering the two remaining grounds of appeal. That notwithstanding, we find it not harmful, if, for purposes of completeness, we, at least, also consider ground 2 of the appeal which is on the complaint that the identification evidence by PW1 and PW2 was not positive and watertight. This is, however, on assumption that the evidence by PW1 and PW2 has not been expunged.

On ground 2 of appeal, while it is the appellant's complaint that he was not positively identified at the scene of crime because the prevailing condition was not favourable for positive identification and also because PW1 and PW2 did not name him at the earliest opportunity to PW3, it is Ms. Fyeregete's contention that the appellant was positively identified because the scene of crime was well illuminated by moon light and also that the appellant was a neighbour and not a stranger to PW1 and PW2.

Our deliberations on ground 2 should begin with the revisit of the law on visual identification. The law on that area is settled. In a landmark case of **Waziri Amani v Republic** [1980] T.L.R. 250, the Court made the following observations regarding this kind of evidence:

> *"... 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".*

In the instant case, the relevant visual identification evidence from PW1 and PW2 is one of the recognition. While we are mindful of the position that identification by recognition is much easier and more reliable than identification of a stranger, we are, however, also aware that, even in such evidence, the possibilities of mistaken identity cannot be ruled out. In **Juma Magori @ Patrick and 4 Others v. Republic,** Criminal Appeal No. 328 of 2014 (unreported), the Court cautioned about the danger of mistaken recognition thus:

> *"...we are also aware that 'recognition evidence could not be trouble free' as was stated by Lord Lane in R. v. Bently [1991] Criminal Law Rex 620 (CA), as even mistakes in recognition of close relatives and friends are often made".*

It was further stressed by the Court in **Elipafula Timotheo v. Republic,** Criminal Appeal No. 350 of 2014 (unreported) that:

> *"Whenever reliance is placed on evidence of visual identification or evidence of recognition, this Court has invariably insisted that courts should only act on such evidence after eliminating all the possibilities of mistaken identity and the potential miscarriage of justice".*

Guided by the above settled positions of the law, particularly on visual identification by recognition, we have carefully examined the relevant evidence from PW1, PW2 as well as from PW3 and found that the evidence falls short of the threshold set by the Court in various of its decisions including in the cases of **Waziri Amani** (supra) and **Hassan Juma Kanenyera v. Republic** [1992] T.L.R. 100. First of all, it is not certain from the evidence on record that the scene of crime was well illuminated and if it was, from which source of light and of what intensity. As we have amply demonstrated when determining ground 5 of the appeal, there is contradictory evidence from PW1, PW2 and PW3 on what was the source of light. While according to PW1 and PW2, the light was from sunlight, to PW3 it came from solar electricity. Worst still, as we have alluded to above, there was no evidence on the intensity of the light.

Secondly, neither PW1 nor PW2 named the appellant who they claimed to have recognised at the scene of crime, at the earliest possible

opportunity to PW3. The record is clear that when PW2 rushed to PW3 to report the incident he did not name the appellant. He only told PW3 that PW1 was being raped without naming the appellant as the one who was allegedly being raping PW1. On part of PW1, there is no evidence on record neither from her nor from PW3, which is to the effect that when PW3 got at the scene of crime, the appellant was named as being the culprit who had raped PW1.

The failure by PW1 and PW2 to name the appellant to PW3 at the earliest possible opportunity suggests that they did not positively identify whoever was a culprit and that if they later named the appellant, which is not clear in evidence, the naming was just an afterthought. In the case of **Festo Mawata v. Republic**, Criminal Appeal No. 299 of 2007 (unreported), the Court observed that:

> *"Delay in naming a suspect without a reasonable explanation by a witness or witnesses has never been taken lightly by the courts. Such witnesses have always had their credibility doubted to the extent of having their evidence discounted".*

Ground 2 of the appeal is therefore meritorious. The identification evidence from PW1 and PW2 was not absolutely watertight and it is doubtful if the appellant was positively identified at the scene of crime.

In the final analysis and in the light of the above observations, we find that the case against the appellant was not proved to the hilt. We

therefore allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. We further order that the appellant be released from prison forthwith unless he is otherwise lawfully held.

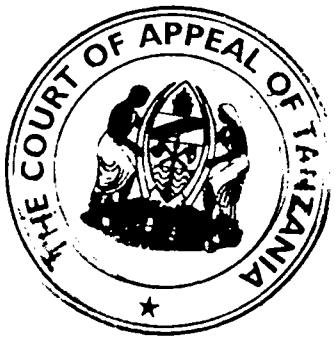
DATED at **TABORA** this 8th day of November, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 9th day of November, 2022 in the presence of the appellant in person and Ms. Mwamini Fyeregete, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL