IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: JUMA, C.J., MKUYE, J.A. And GALEBA, J.A.)

CRIMINAL APPEAL NO. 172 OF 2019

1. NGARU JOSEPH
2. MNENE KAPIKA ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the decision of the High Court of Tanzania, at Mbeya)

(Ndunguru, J.)

dated the 7th day of May, 2019
in
Criminal Appeal No. 75 of 2017

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JUDGMENT OF THE COURT

21st & 25th February, 2022

MKUYE, J.A.:

The appellants, Ngaru Joseph and Mnene Kapika (henceforth the 1st and 2nd appellants respectively) together with Udete Hene who is not subject to this appeal (former 1st accused), were charged and convicted with two counts, to wit, the first count of armed robbery contrary to section 287A of the Penal Code, [Cap. 16 R.E. 2002; now R.E. 2019] (the Penal Code); and the second count of gang rape contrary to sections 130 (2) (b) and 131A (1), (2) of the Penal Code.

Upon conviction, they were each sentenced to thirty (30) years imprisonment together with a corporal punishment of twelve strokes for the first count; and life imprisonment for the second count. In addition, the appellants were ordered to restore to PW1 (victim) Tshs. 580,000/=, his clothes, uniforms, kitenge dresses and other various clothes stolen at the commission of the offence; and to compensate PW2 (victim) an amount to the tune of Tshs. 1,000,000/= each, as per section 348A of the Criminal Procedure Act, [Cap. 20 R.E. 2002; now R.E. 2019] (the CPA). Their appeal to the High Court was unsuccessful, hence, they have brought this second appeal to this Court.

The background of the case leading to this appeal is to the following effect:

The complainants Ngusa Kashinje (PW1) and Kashinje Shija (PW2) were husband and wife. On the material day, 9th – 10th July, 2016, PW1 and PW2 were sleeping in their home together with their three children, PW3 inclusive. At about 2:00 hours, PW1 heard someone knocking the door. He switched on the solar powered light that lit their home. No sooner as he could respond, three people broke the door and two of them who turned out to be the appellants gained entry into their room. The third culprit (former 1st accused) remained outside.

The assailants who entered into the victim's bedroom demanded to be given money by PW1. He replied to have none. This reply angered them and the 1st appellant hit PW1 on the head with an axe that he had with him. Upon being advised by his wife, he gave in and handed the culprits Tshs. 580,000/=. Believing that there was still more money they ransacked the room and took some clothing including kitenge dresses, trousers, t-shirts and uniforms.

As if that was not enough, the assailants took PW2 to the sitting room where the 1st appellant had unlawful carnal knowledge of her while the 2nd appellant was holding her legs apart. Then the appellants departed leaving the axe that was used to attack PW1 outside the house. When PW1 and PW2 were convinced that the culprits had left, they shouted for help whereby some neighbours responded and found the axe used in the commission of the offence outside.

According to PW1, PW2 and PW3, they were able to identify the appellants at the scene of crime. PW1 and PW2 were taken to the police and then to the hospital for treatment. PW7 Dr. Peter Self Kigombola attended them and observed that PW1 was wounded on his head while PW2 had fresh bruises in her vagina suggesting that she was raped. Apart from that, the three witnesses identified them in the identification

parade which was conducted by the police. The appellants were arrested and arraigned before the court as alluded to earlier on.

In their defence, both appellants gave a general denial to the commission of the offence. They also narrated on how they were arrested and identified in the identification parade. Moreover, they admitted knowing PW1 as they were once employed as casual labourers to work in his farm.

The appellants have filed a joint memorandum of appeal containing seven (7) grounds of appeal as follows:

1) *That, the first appellate court erred in law and facts in confirming the conviction and sentence on count 2 against the appellants and sentenced for life imprisonment contrary to section 313A (1) and (2) of the Penal Code, Cap. 16 R.E. 2002 in which no offence was charged against them to such section of the law.*
2) *That, the first appellate Judge erred both in law and fact in convicting the appellants on evidence which did not prove the case beyond reasonable doubt.*
3) *That, the first appellate Judge erred in law and fact for failure to analyse adequately the evidence, and totally ignored the defence evidence of the appellants, as a result he reached to a wrong decision.*
4) *That, the first appellate Judge erred both in law and fact for not concluding that the appellants culprits were not named at the earliest stage.*

5) *That, the first appellate Judge erred in law and fact to base conviction on unreliable evidence of PW1, PW2 and PW3 that render the evidence unworthy of believing.*
6) *That, the first appellate Judge erred both in law and in fact in convicting the appellants while the appellants were not properly identified and the circumstances were not conducive for identification according to the requirement of the law.*
7) *That, the first appellate Judge was biased and erroneously influenced by prosecution side and imported extraneous matters which were not canvassed in evidence during the trial."*

When the appeal was called on for hearing, both appellants appeared in person without any representation; whereas the respondent Republic had the services of Mr. Alex Mwita, learned Senior State Attorney.

On being invited to elaborate their grounds of appeal, they both opted to let the learned Senior State Attorney respond first and reserved their right to rejoin later, if need would arise.

From the outset, Mr. Mwita declared his stance that he was not supporting the appeal but he supported both the conviction and sentence imposed on the appellants. He then submitted that, although the appellants brought seven (7) grounds of appeal, the 1st and 7th grounds were knew as they were not raised and determined by the High

Court. In that regard, he prayed to submit on grounds nos. 2, 3, 4, 5 and 6.

On our part, our starting point would be to comment on the issue relating to new grounds. As was rightly submitted by Mr. Mwita, the 1st and 7th grounds are new since they were not raised and determined by the first appellate court. This Court derives its power under section 4 (1) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2002] which empowers the Court to hear and determine appeals from the High Court or court of resident magistrate with extended jurisdiction. Fortunately, this Court has in times without number underscored that grounds not raised in the first appellate court cannot be raised and determined by this Court unless they are on points of law. (See **Ally Ngozi v. Republic**, Criminal Appeal No. 216 of 2018 and **Felix Kichele and Another v. Republic**, Criminal Appeal No. 159 of 2015 (both unreported)). For instance, in the former case of **Ally Ngozi** (supra), the Court categorically stated that:

> *"...as correctly submitted by the learned Senior State Attorney, the first, fourth, fifth and sixth grounds are new before the Court as they were not raised in the first appellate court, unless they are points of law..."*

Guided by the above position of the law, we are settled in our mind that since in grounds nos. 1 and 7 the appellants are challenging the manner they were sentenced and the first appellate judge's biasness and erroneousness, which are on matters of facts, they ought first to have been raised at the High Court instead of bringing them to this Court for the first time. Therefore, for the reason that they are matters of facts and not of law, those grounds will not be considered by this Court.

Regarding the remaining grounds of appeal, we have opted to deal with them in the following arrangement. We shall begin with the 2nd, 5th and 6th which will be dealt together, followed by the 4th ground and lastly the 3rd ground of appeal.

In the 2nd, 5th and 6th grounds of appeal the appellant's complaints are that **one,** the appellants were not properly identified as the circumstances were not conducive for proper identification and that the identification parade was not properly conducted; **two**, PW1, PW2 and PW3 were not reliable witnesses worth of believing; and **three,** the case was not proved beyond reasonable doubt.

In response to the above grounds of appeal, Mr. Mwita argued that, although the offences of armed robbery and gang rape were

committed at night at about of 02:00 hours, the appellants were identified by PW1 and PW2. He elaborated that, PW1 was able to identify them with the help of solar powered light which illuminated the whole house. He added that PW1 knew the appellants even before the incident as they were once casual labourers whom he hired to work in his paddy farm. In addition, Mr. Mwita contended that PW1's evidence was corroborated by PW2 and PW3 who also knew the appellants. As to PW2, Mr. Mwita submitted that she as well identified them when she was dragged to the sitting room where she was raped. In any case, it was the learned Senior State Attorney's further argument that, the question of familiarity between the witnesses and the appellants was among the undisputed facts during preliminary hearing; and that even in in their defence, the appellants did not deny being familiar with the victims claiming that they worked as labourers to PW1 who paid them Tshs. 75,000/=.

Mr. Mwita submitted further that having regard to the fact that PW1 and PW2 were familiar with the appellants, it can be deduced that the witnesses identified them by recognition which was the most reliable kind identification evidence. To bolster his argument, he referred us to

the case of **Jumapili Msyete v. Republic**, Criminal Appeal No. 110 of 2014 (unreported).

Mr. Mwita went on submitting that, though there was evidence that the witnesses identified the appellants in the identification parade, such parade was unnecessary in the circumstances of the case. At any rate, he contended that the identification parade registers thereof, though admitted in court as Exhibits P8, P9 and P10 were not read over in court, hence, liable to be expunged. However, Mr. Mwita was quick to argue that even if they are expunged, still oral evidence of PW9 sufficed.

In the end, the learned Senior State Attorney urged the Court to find that under those circumstances, there was no possibility of PW1, PW2 and PW3 to have mistakenly identified them. On that bases, he contended that the offences against the appellants were proved beyond reasonable doubt.

We have considered the learned Senior State Attorney's submission against the appellants' complaints. It is not disputed that the offences of armed robbery and gang rape were committed at night. According to PW1 and PW2 the incident took place at about 01:00 hours to 02:00 hours. The appellants were convicted mainly on the basis that they were identified by PW1, PW2 and PW3.

It is important to note that it is now well settled that the evidence of visual identification is the weakest kind of evidence and the courts are warned not to act on it unless all possibilities of mistaken identity are eliminated and that courts are required to be satisfied that such evidence is absolutely watertight. This was the position taken in the case of **Waziri Amani v. Republic** [1980] TLR 250. (See also **Emmanuel Mdendemi v. Republic,** Criminal Appeal No. 16 of 2007 (unreported)).

In **Waziri Amani's** case (supra) the Court went further to propound factors to be considered in ascertaining proper identification such as the time the witness had the appellant under observation; the distance at which he observed the appellant; the time when the offence was committed, whether during day light or at night time and if at night the light used and whether it was sufficient to enable positive identification and whether the witness knew the accused before the incident. It is also noteworthy that in identification by recognition, the factors mentioned above apply.

In as far as the issue of identification by recognition is concerned, this Court dealt with it at lengthy in the case of **Jumapili Msyete** (supra) where the Court explained the types of identification as follows:

> *"For the purpose of analysis and the experience enriched from case law, cases of identification may be identified into three broad categories. Visual identification, identification by recognition, and voice identification. In visual identifications usually, the victims would have seen the suspects for the first time. In recognition cases, the victims claim that they are familiar with or know the suspects. In the last category the victims would usually claim to be familiar with the voice of the suspect although they may or may not have seen him. It is akin to identification by recognition."*

The Court went on to state that:

> *"Of those types of identification, it has been held that identification by recognition is more reliable than that by strangers or by voice."*

In the case at hand as alluded to earlier on, PW1 and PW2 explained on how the offences were committed at night at around 02:00 hours. The appellants broke the house and gained entry in the victim's bedroom. They started to demand to be given money. On being told by PW1 that he had none, the 1st appellant hit him on his head with an axe. In order to save his life, he gave them Tshs. 580,000/=. Then the appellants searched the whole room for more money but ended up

picking kitenge dresses, trousers, t-shirts and uniforms. The witnesses also explained on how the appellants pushed PW2 to the sitting room where 1st appellant raped her with the help of the 2nd appellant who held PW2's legs apart. At the time PW2 was being raped PW3 was peeping from their room and identified them.

When all this was happening, PW1 and PW2 were able to identify both appellants because of the bright solar powered light illuminating the whole house; and that they had known the appellants before the incident as they once hired them to work on their paddy farm. Also, as Mr. Mwita rightly submitted, this fact was admitted by the appellants as undisputed fact during preliminary hearing and in their defence testimony where they admitted to be familiar with the victims contending that they worked in a paddy farm and were paid Tshs. 75,000/= by PW1 for the work. Being guided by the principles set out in **Jumapili Msyete's** case (supra), and considering the account given by the witnesses, we agree with the learned Senior State Attorney that there was conducive environment which enabled PW1 and PW2 to identify the appellants properly by recognition as the ones who committed the two offences.

With regard to identification parade, the record shows that PW9 conducted it. He testified on how the appellants were identified and three registers thereof were admitted as Exhibits P8, P9 and P10. According to section 60 (1) of the CPA, an identification parade may be conducted during the investigation stage for the purpose of ascertaining whether a witness can identify the suspect of the crime. In particular, the purpose of an identification parade is to enable a witness identify his/her assailant whom he/she has not seen or known before the incident (See **Joel Watson @ Ras v, Republic,** Criminal Appeal No. 143 of 2010 (unreported)). Also, the identification parade which is conducted by the police is not meant to be substantive evidence (See **Imamu Selemani Msovu and Another v. Republic,** Criminal Appeal No. 306 of 2010 (unreported).

In so far as this case is concerned, apart from the appellants' complaint that it was irregularly conducted, Mr Mwita also challenged it and, we think rightly so, that the said identification parade was unnecessary in view of the fact that the witnesses were familiar with the appellants and also for failure to read over the identification parade registers in court after they were cleared for admission. In this regard, as the said exhibits were not read over in court, we hereby expunge

them. However, despite the expungement of the said exhibits, having gone through the evidence of PW9 we agree with Mr. Mwita that still oral evidence of PW9 sufficed. It corroborated PW1 and PW2's identification evidence.

In relation to the complaint that PW1, PW2 and PW3 were not reliable witnesses, it was Mr. Mwita's argument that except for PW3, PW1 and PW2 were reliable witnesses looking at how they testified in the trial court. Apart from that, he contended that their evidence was corroborated by PW4, PW5, PW6 and PW7.

Regarding PW3's evidence, he submitted, it should be expunged from the record since it was taken without the witness giving a promise to tell the truth in terms of section 127 (2) of the Evidence Act, [Cap. 6 R.E. 2019] (Evidence Act) as amended. Instead, her evidence was taken under the repealed law.

To begin with, we think, we need to revisit the guiding principles on reliability and credibility of witnesses. It is noteworthy that the assessment of credibility of witnesses, especially on the question of demeanour, is under the monopoly of the trial court. In the case of **Goodluck Kyando v. Republic** [2006] T.L.R 363, the Court discussed the issue of credibility and stated as hereunder:

"It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness".

Yet, the manner how credibility can be determined was stated by the Court in the case of **Shabani Daudi v. Republic,** Criminal Appeal No. 28 of 2000 (unreported), as follows:

"The credibility of a witness can also be determined in two ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."

(See also **Salum Ally v. Republic,** Criminal Appeal No. 106 of 2013 (unreported)).

On our part, having scanned the evidence of PW1 and PW2, we find no reason to disagree with the learned Senior State Attorney on the reliability of witnesses. PW1 and PW2 gave cogent and reliable evidence on how the offences of armed robbery and gang rape were committed

and how they identified the appellants. PW1 and PW2 explained that they identified the appellants when they entered in their room, injured PW1 and robbed his money and how PW2 was taken to the sitting room and raped. This evidence proves that the witnesses were credible and reliable and there is no good reason given for not believing them. We are thus satisfied that in view of the evidence of PW1 and PW2 who knew the appellant before the incident, there could not have been any possibility of mistaken identity. In any case, the evidence of PW4, PW5, PW6 and PW7 corroborated their evidence.

As regard PW3's testimony, we agree with Mr. Mwita that her evidence has no evidential value particularly so because it was received in contravention of section 127 (2) of the Evidence Act as amended by the Written Laws (Miscellaneous Amendments) (No 2) Act, 2016 (No. 4 of 2016). We note from the record of appeal at page 14 to 15 that the trial magistrate adopted the procedure of *voire dire* test to PW3 under the repealed law. After having conducted the said test the trial magistrate allowed PW3 to testify without oath since she was found to possess sufficient intelligence but she did not understand the nature of oath. This was a clear contravention of section 127(2) of the Evidence Act as amended which states as follows:

> *"A child of tender age may give evidence without taking an oath or making affirmation but shall, before giving evidence, promise to tell the truth to the court and not tell lies."*

(See also **Msiba Leonard Mchere Kumwaga v. Republic,** Criminal Appeal No 550 of 2015 and **Ibrahim Haule v. Republic,** Criminal Appeal No 398 of 2018 (both unreported)).

In this regard, from the omission that was caused by the trial court when taking the evidence of PW3, we are inclined to agree with the learned Senior State Attorney that her evidence was of no evidential value. We thus accept Mr. Mwita's invitation and hereby expunge it from the record of appeal.

For avoidance of doubt, however, despite the expungement of PW3's evidence, we are still satisfied that PW1 and PW2 were credible reliable witnesses whose evidence was corroborated by PW4, PW5 and PW7.

We now move to the 4th ground of appeal in which the appellants' complaint is that they were not mentioned at the earliest possible time after the commission of the offence. In response, Mr. Mwita dismissed that claim arguing that after the appellants had left, PW1 and PW2

mentioned them to people who responded to the alarm raised particularly to Ndugali Kashinje, (PW4) and Andreas France Gonelamenda (PW5) who also knew the appellants.

On our part, we have examined the record of appeal on the aspect and we have noted that it bears out that immediately after the incident, PW1 and PW2 shouted for help which was responded by people including PW4 (village chairman) and PW5 (Village Executive Officer). PW1 and PW2 mentioned the appellants to PW4 and PW5 who happened to know them and caused them to be arrested in the following morning. It is now settled law that the ability of the witness to name the suspect at the earliest opportunity time gives assurance of the reliability of the witness – See **Marwa Wangiti Mwita v. Republic**, [2002] TLR 39 where it was stated:

> *"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 an unexplained delay or complete failure to do so should put a prudent to inquiry."*

Even in this case, the fact that PW1 and PW2 mentioned the appellants to their neighbours PW4 and PW5 who had responded to the cry for help, it gave an assurance of the reliability of their evidence. This

explains why it was possible to arrest them on the following day. In this regard, it is not true that the witnesses failed to name them at the earliest opportunity as the appellants complained. This ground, therefore, lacks merit and we dismiss it.

In the 3rd ground of appeal, the appellants' complaint is that the first appellate judge failed to adequately analyse the evidence and ignored the defence evidence of the appellants. On the other hand, the learned Senior State Attorney argued that the trial court analysed the evidence and the appellants' defence evidence as shown at page 78 of the record of appeal. At any rate, he contended that though the first appellate judge did not consider it, he would not have said much in view of the nature of the appellants' defence that was a general denial to the commission of the offence and did not raise any doubt to shake the prosecution evidence.

Having passed through the record of appeal, we have noted that, indeed, the first appellate court did not consider the defence evidence despite the fact that the appellants, in their 10th ground of appeal in the petition of appeal they had complained that the trial magistrate disregarded their defence evidence. However, as the learned Senior State Attorney rightly submitted, it is notable that the trial magistrate

discussed it at length as at page 78 of the record of appeal. We are mindful that where the defence case is not considered by the two courts below, this Court is entitled to step into shoes of those courts below and look at the evidence and make its own findings of facts - (See **Deemay Daati and 2 Others v. Republic** [2005] TLR 132.

In this case, as we hinted above the appellants gave a total denial to the commission of offence and narrated on how they were arrested and identified in the identification parade. Since failure to consider defence evidence was among the grounds of appeal in the first appellate court (the High Court), we think, it was enjoined to deal with it even if by upholding the analysis made by the trial court. Failure to deal with that ground of appeal in our view was not proper and, thus, we allow this ground.

Be it as it may, being guided by **Deemay Daati's** case (supra) we have considered the defence evidence mainly their total denial in the commission of the two offences and their testimony regarding their arrest and being identified in the identification parade. However, having weighed it against the evidence of PW1 and PW2 that was corroborated by PW4, PW5, PW6 and PW7 in material particular, we find that it does not raise any doubt capable of shaking the strong prosecution case. On

the contrary, we find that the prosecution witnesses were able to prove the two offences beyond reasonable doubt.

That said and done, except for ground No. 3 and grounds Nos. 5 and 6 partially allowed, we find that the appeal is not merited. We hereby dismiss it in its entirety.

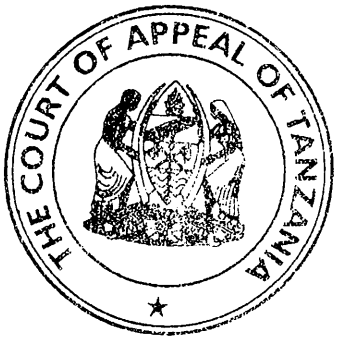
DATED at **MBEYA** this 25th day of February, 2022.

I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 25th day of February, 2022 in the presence of the Appellants in person and Ms. Nancy Mushumbusi, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL