

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MKUYE, J.A., MWANDAMBO, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 301 OF 2021

BONIFACE PATRICK @ MCHAPO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mtwara)

(Dyansobera, J)

dated the 4th day of June, 2021

in

Criminal Appeal No. 19 of 2020

JUDGMENT OF THE COURT

20th March & 27th April, 2023

RUMANYIKA, J.A.:

This appeal is against the decision of the High Court at Mtwara, arising from the decision of the District Court of Mtwara (the trial court). Boniface Patrick @ Mchapo, the appellant and two others who are not in this appeal were charged with four counts, namely; **one**, conspiracy to commit an offence and **two**, gang rape. As regards count numbers **three** and **four**, they were charged with armed robbery each. At the end of the trial, the appellant was acquitted from the 1st count and convicted on the 2nd, 3rd and 4th counts. He was sentenced to life imprisonment on the 2nd count and thirty

years on the 3rd and 4th counts each. The sentences were ordered to run concurrently.

A brief background of the matter is that, on 19th March, 2018, at about 17:00 hours, Teresa Kathalina Jakovlev (PW3) and Claas Janzen (PW4) were at Litingi Beach within Mtwara Municipality enjoying their evening moment. However, a group of young men stormed in and dragged them into grasses around. The culprits tied PW4's hands and robbed them with an assortment of valuable personal belongings and cash. They also raped PW3 in turn. PW1 recognized the appellant in the initial scuffle. He attempted to interrupt them but the appellant warned him to mind his own business. He reported the incident to the police and assisted them to arrest the appellant. Later, an identification parade was conducted at which, PW3 and PW4 allegedly identified the appellant and his fellows. He was subsequently convicted and sentenced as highlighted above.

Being aggrieved, he unsuccessfully appealed to the High Court. Still aggrieved, he is before the Court with sixteen grounds of appeal in three sets of three, in the substantive memorandum of appeal. Subsequently, he lodged a supplementary memorandum of appeal comprising six grounds followed by six additional grounds ahead of the hearing of the appeal.

However, for reasons that will come to light shortly, the disposal of this appeal will not require us to reproduce those grounds.

At the hearing of the appeal, the appellant appeared in person unrepresented whereas Ms. Jacqueline Werema learned State Attorney, represented the respondent Republic. At the commencement, the appellant opted to let Ms. Werema submit first while reserving the right to rejoin, should such need arise.

Initially, Ms. Werema resisted the appeal on the 2nd count of gang rape but supported it on the 3rd and 4th counts involving armed robbery. She argued that, the evidence adduced did not establish and prove the offence charged to the required standard. However, in the course of her submission, on reflection, she also supported the appeal on the 2nd count conceding that, identification of the appellant by the victims was so doubtful that even the offence of gang rape was not proved on the required standard. It was her argument that, even if he was identified, the appellant should have been convicted of an offence of rape and not gang rape, after his co-accused had been acquitted.

Considering the new course taken by Ms. Werema to support the appeal entirely and her submission, the appellant's grounds of appeal will now boil down to only one issue for our consideration: Whether identification of the appellant at the crime scene properly grounded his conviction. The principles governing visual identification have been reiterated by the Court in a number of cases including **Waziri Amani v. R.** [1980] TLR. 250.

It follows therefore that, by the victims' failure to name the appellant at the earliest opportunity or describe him before, an identification parade which was subsequently mounted by the police was inconsequential in the circumstances. So was the respective oral evidence of the police officer who conducted the parade. The reason for holding so shall be given at a later stage.

Further, the appellant is challenging his identification made by PW3 and PW4, the victims for not being watertight because none of them knew him before and they did not describe him before be it by color, size, height or complexion. As a matter of principle, failure of the victims to describe the appellant should have put the trial court and later, the first appellate court to inquiry and find that, the two witnesses were not credible and reliable in identifying the appellant. Being confronted with similar situations in a

number of cases including **Marwa Wangiti Mwita and Another v. R.** [2002] T.L.R. 39 and **Swalehe Kalonga @ Swalehe and Another v. R.**, Criminal Appeal No. 46 of 2001 (unreported) we reiterated the above principle. In other words, the omission to describe the appellants at the earliest rendered the subsequent identification parade to be of no probative value. The Court has pronounced itself in this regard in various decisions including in **Emilian Aldan Fungo @ Alex & Another v. R.**, Criminal Appeal No. 278 of 2008 and **Flano Alfonse Masalu @ Singu v. R.**, Criminal Appeal No. 366 of 2018 (both unreported).

For more clarity, the testimony of PW3 and PW4 appearing at pages 24-26 of the record of appeal is to the effect that, the appellant and his fellows robbed them in the day light and just after they suddenly invaded them and ordered them to lie down. The above circumstances in our view, suggested that the possibilities of mistaken identity of the appellant could not be eliminated more so considering the evidence of PW3 who stated that at that moment the appellant ordered her to close her eyes and she complied. That means that, the victims were in such a terrifying atmosphere that they could not identify the appellant properly. We are saying so because the test of an effective visual identification that we stated in **Waziri Amani**

(supra) has been reiterated by the Court in its subsequent decisions that, such identification of an accused is the weakest and most unreliable form of evidence. In order to found conviction it must be watertight to eliminate all possibilities of mistaken identity. Mistaken identity apart, on different occasions the Court has broadened the range of the tests and factors that may invalidate visual identification. For instance, in **Philimon Jumanne Agala @ J4 v.R.**, Criminal Appeal No. 187 of 2015 (unreported) we observed that:

"...It has been repeatedly held that eye witness testimony can be devastating when false witness identification is made due to honest confusion or outright lying..."

See also: **Mengi Paulo Samwel Lahana and Another v. R.**, Criminal Appeal No. 222 of 2006 and **Nyakango Olala James v. R.**, Criminal Appeal No. 32 of 2010 (both unreported).

In sum, for the reason of unreliable identification of the appellant by PW3 and PW4 founding conviction as we have discussed before, we hasten to hold that, the prosecution case was not proved to the required standard which is beyond reasonable doubt to found conviction as rightly supported by the learned State Attorney.

In the result, we find the appeal merited and hereby allow it. Consequently, we quash the conviction and set aside the sentence imposed against the appellant. We order his immediate release from the prison unless he is otherwise held there for other lawful cause.

DATED at DAR ES SALAAM this 21st day of April, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

Judgment delivered this 27th day of April, 2023 via video facility connected from Mtwara High Court in the presence of Mr. Melkiory Hurubano, State Attorney for the Respondent and the Appellant in person is hereby certified as a true copy of the original.



F. A. Mtaranja
F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL