IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: WAMBALI, J.A., KITUSI, J.A. And NGWEMBE, J.A.)

CRIMINAL APPEAL NO. 576 OF 2020

STRATON S/O STEVEN MBOYA .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

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

(Mutungi, J.)

Dated 27th day of September, 2020

in

DC. Criminal Appeal No. 2 of 2020

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JUDGEMENT OF THE COURT

29th April, & 10th May, 2024

WAMBALI, JA.:

The appellant, Straton Steven Mboya and Innocent Maiko Minja @ Mpya (not a party to the appeal) were arraigned before the District Court of Moshi at Moshi where they faced a joint charge of gang rape contrary to section 131A of the Penal Code. The allegation placed in the particulars of the offence was to the effect that, the two together with others, who were at large, on 23rd April, 2017 at Majengo area within the District of Moshi in

Kilimanjaro Region did have carnal knowledge of a girl aged 17 years. For the sake of concealing her identity, we will refer her as a "victim" or "PW1".

The substance of the evidence of the prosecution concerning the incident is depicted from the testimony of PW1. She testified that on 23rd April, 2017 at 21:00 hours while on the way to her home accompanied by her sister known as Generosa, she encountered the appellant and his colleagues. Though, it was in the night she was able to identify the appellant through a light from a mobile phone. She testified that she easily recognized the appellant because he was a neighbor. She added that it was not the first time to see him because he had previously approached her and made a proposal to have sexual intercourse with her but she refused.

PW1, disclosed that on the particular date the appellant held her hand and sent her to the unfinished building and had initial sexual intercourse with her and later the two other persons whom she did not know their names raped her one after the other. Then the appellant had the second round of raping PW1. According to PW1, when the appellant and three others held her for sexual intercourse, one of the persons held her sister to prevent her from assisting. The incident left PW1 tired, restless, strengthless and bleeding from her vagina. PW1's sister went to rescue her later and thus the

appellant and his colleagues ran away. PW1 and her sister went to the street chairman to report the incident but the door was not opened and thus they went back to their home. In the morning, they went again to the street chairman where they reported the matter. The street chairman wrote a letter to Majengo Police Station where a PF3 was issued for PW1 to go to Majengo Hospital. PW1 testified that at the scene of crime he did not see Innocent Maiko Minja @ Mpya who was the second accused at the trial.

Christina Andrew Mkemi (PW2), a clinical officer at Majengo Dispensary examined PW1 on 25th April, 2017 at 11:00 hours. During the examination, she saw bruises in PW1's vulva which caused clots of blood and thus she was of the opinion that something penetrated in the vagina. She further formed an opinion that though PW1 was a virgin, it seemed a blunt object had penetrated into her vagina and that the incident of rape might have occurred 24 hours before she went to hospital. PW2 tendered a PF3 which was admitted as exhibit P1.

WP 2133 D/Sgt Mariam is on record to have received a file to investigate the incident on 25th April, 2017 at 16:00 hours. Nonetheless, when she communicated with PW1 for interrogation, she was informed that she was not ready on that day. The interrogation was thus conducted on

26th April, 2017. PW3 testified that the incident of rape occurred on 23rd April, 2017 involving five men but PW1 managed to identified the appellant only.

The appellant denied the allegation and stated that on 23rd April, 2017 while on Majengo streets he was approached by some young men who told him that he was suspected of having raped a girl. They also initially asked him whether he was called Juma but he denied. They arrested and sent him to Majengo Police Station where he was beaten and informed that he had the habit of raping girls. He denied the allegation. After interrogation, he was taken to court to face trial on the offence of rape. The appellant who testified as DW1, critically contested the evidence of PW1, particularly on the issue of identification. He stated that if PW1 knew him before and was raped on the material date, why did she remain at home silently until 25th April, 2017 when she went to hospital for medical examination? He added that, if at all he resided in the same street with PW1 why did she fail to mention his name after he cross-examined her. The appellant also wondered why PW1's sister did not appear to testify to corroborate her story though she was listed among the witnesses for the prosecution. He thus contended that PW1 did not know who raped her on the fateful date.

Innocent Michael Minja @ Mpya, who was the second accused similarly disassociated himself with the commission of the offence. He stated that he was arrested on 25th April, 2017 in connection with the said allegation but during the trial PW1 testified that she did not identify him at the scene of crime.

Be that as it may, at the climax of the trial, the trial Resident Magistrate acquitted Innocent Michael Minja @ Mpya for lack of evidence that linked him with the offence. However, he believed the prosecution story and disbelieved the appellant's defence and held that it did not raise doubt. Consequently, he found him guilty, convicted and sentenced him to a prison term for thirty years.

The appellant's desire to upset the findings of the trial court was in vain as his first appeal to the High Court was dismissed in its entirety, hence this second appeal. The appellant's grievances are expressed in the memorandum of appeal containing seven grounds concerning; identification, contradiction in the evidence of the prosecution's witnesses, failure by the trial court to comply with the provisions of section 210 (3) of the CPA, failure by the prosecution to summon material witnesses and whether the case was proved beyond reasonable doubt. However, at the very outset, we deem it

appropriate to point out that though we heard parties in respect of those grounds, after considering their submissions and the evidence on record, we are of the view that, the determination of this appeal hinges on two main grounds. These are on identification and proof of the case beyond reasonable doubt.

At the hearing of the appeal, the appellant entered appearance in person, with no legal representation while the respondent Republic had the services of Ms. Grace Madikenya assisted by Mr. Philbert Mashurano, learned State Attorneys.

When afforded an opportunity to amplify his grievances, the appellant basically urged us to consider the grounds of appeal and briefly insisted that his alleged identification at the scene of crime by PW1 was not watertight as required by law. He added that as a result, the case against him was not proved beyond reasonable doubt and therefore the two courts below wrongly came to a concurrent finding that he is guilty. Lastly, he prayed for his appeal to be allowed.

Mr. Mashurano commenced his response by submitting that according to the evidence on record, particularly the testimony of PW1, PW2 together with exhibit P1 (the PF3), the victim was raped on the fateful date. He argued

that the victim testified in detail on what transpired on that day when she encountered the assailants who included the appellant. He emphasized that since the best evidence of rape has to come from the victim, the trial and first appellate courts properly believed PW1 as a credible witness considering her detailed narration on what transpired on the fateful date. He thus implored the Court to confirm the concurrent findings of facts by the two courts below on this matter.

Submitting on identification of the assailants at the scene of crime, Mr. Mashurano strongly asserted that though PW1 did not identify the other suspects, she categorically identified the appellant. The thrust of his submission was built on the following points. **One,** though the incident occurred during the night, PW1 had the aid of the mobile phone light which she held whose intensity facilitated the identification. **Two,** PW1 recognized the appellant as she knew him before because they resided in the same street and that, he previously approached her with the request to have sexual intercourse but she refused. **Three,** PW1 reported the incidence to the street chairman and the police within a reasonable time and mentioned the appellant as the perpetrator. **Four,** the fact that the appellant was a

neighbor of PW1 was not contested as he agreed to have known her before when he was cross-examined.

Responding on the complaint of the appellant that PW1 delayed to name him immediately after the incident, Mr. Mashurano submitted that the delay of a single day was fully explained by PW1. He explained that PW1 stated that she could not report on the same date because she went to the street chairman and found the door closed and thus, she went home. However, PW1 reported the incident in the following morning because she could not go to the police station as it was in the night.

The learned State Attorney also argued that the alleged contradiction between the evidence of PW1 and PW3 on the number of suspects who were at the scene of crime is minor because PW3's evidence was based on what she was informed by PW1 and therefore, it was hearsay. To this end, he stated, the direct evidence of PW1 prevails as she was at the scene of crime. Regarding the failure by the prosecution to summon PW1's sister and the street chairman to testify in support of the case at the trial, Mr. Mashurano stated that they were not material witnesses and thus, the prosecution was not bound to summon them. He emphasized that PW1 was a key witness whose evidence could solely prove the charge.

In the circumstances, Mr. Mashurano submitted that the case against the appellant was proved beyond reasonable doubt and pressed us to dismiss the appeal.

We have no hesitation to state that, it is settled that the best evidence in sexual offences is that of the victim and thus evidence from other witnesses may be corroborative as expounded in **Seleman Makumba v. The Republic** [2006] T.L.R. 379 and **Godi Kasenegala v. The Republic,** Criminal Appeal No. 10 of 2009 (unreported). However, it must also be appreciated that the evidence of such witness should be credible and should not be taken wholesale without considering other important matters on coherence, reliability and other circumstances. For this stance, see for instance, **Majaliwa Ihemo v. The Republic** (Criminal Appeal No. 197 of 2020) [20221] TZCA 304 (15 July 2021, TANZLII). Indeed, in **Mohamed Said v. The Republic,** (Criminal Appeal No. 145 of 2017) [2019] TZCA 252 (22 August 2019, TANZLII), the Court stated that:

> *"We are aware that in our jurisdiction it is settled law that the best evidence of sexual offence comes from the victim [**Magai Manyama v. Republic** (supra)]. We are also aware that under section 127 (7) of the Evidence Act [Cap. 6 R.E. 2002] a conviction for a*

sexual offence may be grounded solely on the uncorroborated evidence of the victim. However, we wish to emphasize the need to subject the evidence of such victims to scrutiny in order for courts to be satisfied that what they state contain nothing but the truth."

In this regard, this being a second appeal, the Court is still entitled to determine the credibility of a witness when examining the finding of the first appellate court though ordinarily that duty is the monopoly of the trial court. See **Shaban Daudi v. The Republic,** Criminal Appeal No. 28 of 2001 (unreported).

In the case at hand, gauging from the evidence of PW1 and PW2 together with exhibit P1 (the PF3), there may be no doubt that the offence of rape was committed against PW1 as penetration was proved as required under section 130 (4)(a) of the Penal Code and reiterated in several decisions of the Court, including **Ally Mkombozi v. The Republic,** Criminal Appeal No. 227 of 2007 (unreported). However, the crucial issue at this juncture, is who was the perpetrator of the offence of rape.

It was consistently testified by PW1 that she recognized the appellant being among the perpetrators at the scene of crime by the aid of light from

the mobile phone and that he was familiar to her because they were neighbours who resided in the same street. As alluded to above, the epicenter of the conviction of the appellant by the trial court rested on the finding of fact that the appellant was positively identified by PW1 at the scene of crime on the material day.

It is acknowledged that in a criminal trial whose determination depends essentially on identification, the evidence of the victim on the conditions that facilitated her correct identification of the perpetrator has to be given top priority (see **Raymond Francis v. The Republic** (1994) T.L.R. 100).

Moreover, the ability of the witness to disclose the name of the perpetrator at the earliest time following the commission of the offence adds credence to her evidence (see **Yadunia Nicodem v. The Republic,** Criminal Appeal No. 177 of 2007 (unreported), among other decisions of the Court.

In the case under consideration, having critically scrutinized the evidence on record, we entertain doubt on whether the appellant was properly identified by PW1 at the scene of crime. We hold this position because: **one,** though PW1 stated that she easily recognized the appellant because she knew him before as a neighbour who resided in the same street,

her evidence is not fully supported by the rest of the evidence on record. PW1 evidence on this matter was seriously challenged by the appellant during cross-examination. Particularly, PW1 stated as follow: *"... I saw you clearly, I saw your face. You were called by your fellow, Straton..."* It is thus highly questionable why PW1 had to depend on the appellant's colleagues to mention his name as Straton if she really knew him before. Basically, PW1 testified that the appellant had previously approached her with a proposal to have sexual intercourses but she refused. We are alive to Mr. Mashurano's argument that the appellant admitted to have known PW1 before. However, that was not to say PW1 and the appellant resided in the same street as alleged because he said nothing on that matter in his defence. Specifically, during cross-examination the appellant stated thus:

> *"I didn't know Joyce before, I knew her sister, I came to know her in court. Joyce didn't know who did the bad act to her, I knew Joyce by face. I used to see her."*

It is unfortunate that even the investigator of the case (PW3) did not conduct investigation to establish the fact that the appellant and PW1 were neighbours who resided in the same street and thus they knew each other for some time. When cross-examined by the appellant PW3 stated:

"The scene occurred in Missisipi area. No neighbour of Missisipi interrogated."

Indeed, there is no indication that PW3 was told by PW1 that the appellant was her neighbour as her evidence is silent on the matter. In the circumstances, the victim's sister one Genoroza whom they were together on that day and was listed as a witness but did not testify at the trial, would have cleared some doubt not only on whether she also managed to identify the appellant at the scene of crime but also that he was their neighbour who they lived in the same street. Equally important, the street chairman to whom PW1 and her sister reported the incident initially and wrote a letter to refer them to Majengo Police Station could have been a material witness to support PW1's story that she reported and indeed mentioned the appellant as a perpetrator. Hopefully, the street chairman would also have explained if the appellant and PW1 resided in the same street. Unfortunately, he was never summoned by the prosecution to testify. In this regard, we hold a firm view that PW1's sister and the street chairman were material witnesses whose absence casted further doubt on whether PW1 really identified the appellant among the perpetrators of the offence. We therefore, respectfully decline to go along the spirited submission by Mr. Mashurano that those

persons were not material witnesses because the evidence of PW1 would have solely sufficed to prove the case.

We must emphasize that in the circumstances of the case under consideration, failure to summon PW1's sister and the street chairman would have entitled the trial and first appellant courts to draw adverse inference to the prosecution case. Faced with an akin situation, in **Riziki Method @ Myumbo v. The Republic,** Criminal Appeal No. 80 of 2008 (unreported), the Court stated:

> *"Secondly, since the two witnesses unequivocally claimed that they had known very well, even by name, the appellant and his co – accused prior to the day of robbery, the evidence of Ruvanda was essential to establish if the appellant had been immediately mentioned by them to him, as one of the four robbers. To us, under these circumstances, Ruvanda became an essential prosecution witness who could not be easily dispensed with. Failure to call him could force us to draw an adverse inference against the prosecution on the two material facts upon which the conviction of the appellant was based."*

It follows that, since the two lower courts did not draw that inference, we accordingly draw it.

Two, the evidence of PW1 casts doubt on her credibility with regard to the date she reported the incident at Majengo Police Station. PW1 was categorical during her evidence in chief that she reported the incident the next day, that is, 24th April, 2017 as the incident occurred on 23rd April, 2017 at 21: 00 hours. We wonder if she really reported to the police on that day because according to the evidence on record, the PF3 was issued to her on 25th April, 2017 and she was examined by PW2 on the same day. Admittedly, if she went to police station on 24th April, 2017, the PF3 could have been issued on that date as we are not told if there were obstacles in obtaining the same. Besides, the evidence of PW3 shows that she was tasked to investigate the case on 25th April, 2017 and interrogated PW1 on 26th April, 2017 because when she first communicated with her, she said she was sick on that day. Worse still, when PW3 was cross-examined by the appellant, she stated that the record at the police station indicted that the victim reported the incident at police station on 23rd April, 2017 at 21.00 hours. During re-examination, PW3 stated that PW1 reported the incident at the police station on 25th April, 2017. In this regard, the evidence of PW1 was

not consistent having regard to the other evidence of the prosecution witness on record.

Three, there was an unexplained delay in reporting the incident and naming the appellant to the police. According to the record, the incident was reported on 25th April, 2017 when the PF3 was issued. That delay was not explained sufficiently contrary to the submission of the learned State Attorney. It is also doubtful if PW1 really reported the incident to the street chairman on 24th April, 2017 as alleged and that is why his evidence was important. As we have emphasized above, failure to report the incident and name the suspect early brought into question her credibility. Admittedly, delay in naming a suspect may justify fears on the veracity of a witness and erode her credibility.

Four, the evidence of PW1 raised doubt on the actual number of perpetrators who were at the scene of crime. While during examination in chief PW1 stated that they were four, when cross – examined, she replied that they were five. More importantly, though PW1 stated that the incident occurred at 21:00 hours, she did not disclose the time the perpetrators spent at the scene and the time she initially went to the street chairman to report where she found the door closed.

In the circumstance of what we have exposed above and taking into consideration that the incident occurred at night, it cannot be safely concluded that PW1 properly identified the appellant by recognition to have been among the perpetrators of the offence of rape. Thus, the possibility of mistaken identity cannot be overlooked. It is noteworthy that for the evidence of the witness to be watertight it must be relevant to the fact in issue and consistent. In **Nhembo v. The Republic,** Criminal Appeal No. 33 of 2005 (unreported), the Court stated that:

> *"In law... for evidence to be watertight, it must be relevant to the fact or facts in issue, admissible, credible, plausible, cogent and convincing as to leave no room for a reasonable doubt."*

It follows that since the determination of the case essentially depended on identification of suspects spotted at the scene of crime, considering the evidence on record, the prosecution case was not proved beyond reasonable doubt. In the event, considering the defence of the appellant, the doubt has to be resolved in his favour.

In the result, we allow the appeal. Consequently, we quash the conviction and set aside the sentence of imprisonment imposed on the

appellant. Ultimately, we order the immediate release of the appellant from custody unless lawfully held for other causes.

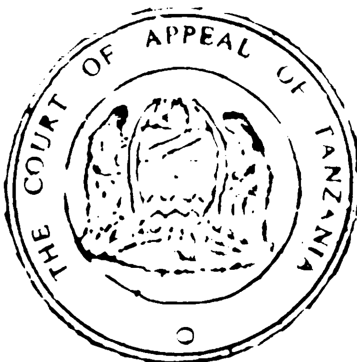
DATED at **MOSHI** this 9th day of May, 2024.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

Judgment delivered this 10th day of May, 2024 in the presence of the Appellant in person and Ms. Julieth Kombo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL