IN THE HIGH COURT OF TANZANIA
AT BUKOBA
APPELLATE JURISDICTION

HIGH COURT CRIM. APP. NO. 65 OF 2006
(Arising from Ngara District Court Crim. Case No. 61 of 2006 - before Biyereza, G.G. DM Esq).

NGERAGEZE ALOYS ..... APPELLANT
Versus
THE D.P.P ... . RESPONDENT

01/11 & 14/12/07

Lyimo, J.

JUDGMENT

The Appellant Ngerageze s/o Aloys was charged before the Ngara District Court in Criminal Case No. 61 of 2006 with the Offence of Rape, contrary to Section 130 (1) (2) and 131(1) the Penal Code as repealed and replaced by Sections 5 (2) and 6 (1) of the Sexual Offences Special Provisions Act, No. 4 of 1998.

The particulars of the Offence stated that appellant on 10th January 2006 at Lukole "B" Refugee Camp, Ngara District, Kagera Region, at 10.00 a.m. had sexual intercourse with one Nteturuye Aline, a girl aged 13 yrs.

The appellant pleaded not guilty to the charges and after a full trial, he was convicted and sentenced to thirty (30) years imprisonment. He now appeals against both the conviction and sentence.

In his appeal, the Appellant filed a total of four (4) lengthy grounds of appeal, contesting his innocence. In the main, the appellant has raised basically two major grounds, in which he complains that first; the case was not proved to the required standard. He complains that the prosecution did not conduct an identification parade which was a necessary step in this case and second that the evidence of Pw1 and Pw2 lacked corroboration and could not be relied upon. When filing his appeal, he indicated that he did not intend to appear during the hearing of his appeal and as a result, the appeal was heard in his absence.

Mr. Ndjike, learned State Attorney who appeared for the Republic strongly resisted the appeal on the basis that the evidence by the prosecution was watertight and that the two principal witnesses (Pw1 and Pw2) were credible and there were no suggestions that they had any ill-will to implicate the appellant with the serious charge of rape.

The brief facts of the case were that on 10th January 2006 at around 10 a.m., the complainant – Nteturuye Aline (Pw1) and Ngilamahoro Asteria (Pw2) in the company of other young girls went outside the camp to look for firewood.

Pw1testified in the court that she was living at Lukole B Refugee Camp. The area is also called Lumasi. She was a school girl then attending Standard 1V. On 10/01/2006 in the morning, she together with Pw2 and other girls namely Niyibategeka, Munezi Jean Claude, Vivian and Ndukubwayo left their camp and went looking for firewood. While they were busy looking for firewood, the appellant appeared and

greeted them. He was then carrying a big stick. Thereafter, the appellant told Pw1 and the others to accompany him to a place where he was going to get charcoal. It is not clear and it was not specified how far away these girls were from the camp. They complied with his directives and after they had walked for some distance, the appellant divided the girls into two separate groups. Pw1 and Pw2 were in one group, while the rest remained in another group.

Pw1 told the court that after the appellant had divided them into two separate groups he ordered the second group to move some distance away and to remain where it was or else he would shoot them if they attempted to move away. The appellant then turned to Pw1 and Pw2 and ordered them to strip naked. Pw1 resisted. He knocked and threw Pw1 to the ground and raped her in full view of Pw2 and the other group. After he had raped Pw1, he released her whereupon the two girls went back to the camp and Pw1 reported to a relative one German and thereafter to the authorities at the camp.

Pw1 was then referred to the Police and was issued with a PF.3 for medical examination. The PF3 was tendered as exhibit P1. Pw1 stated that during the time of the incident, she did not know the appellant. However, she asserted that she could later identify him because of a big scar on his head which she had observed during the time of the rape.

The evidence by Pw2 did not materially differ from that of Pw1. Pw2 stated in addition that when they were at Makalisho area collecting firewood, the appellant appeared to them carrying a big knife, a stick and had something which resembled a firearm. Pw2 in her evidence stated that after the appellant had divided the girls into two separate groups, the appellant ordered her and Pw1 to strip naked. That Pw1 resisted the order and that is when the appellant grabbed her, threw her to the ground and raped Pw1 in her presence and in the presence of the other girls. And that on 23/02/06 when the appellant was brought in the company of three other men, Pw2 easily identified him due to the big scar on his head.

In his defence, the appellant strongly denied to have committed the offence of rape and stated that prior to being brought to court, he was involved in a case where he was being charged with theft of maize. He was remanded in custody for a period of two months and upon release, he was then charged with the current offence. He asserted that if indeed he had committed the alleged offence, the police would not have taken a long time in arresting him since they all stay in the same camp.

In convicting the appellant, the trial magistrate took into consideration the evidence of Pw1 and Pw2 together with the medical examination report, exhibit P.1. To the trial magistrate, Pw2 was an independent witness who provided material corroboration to the evidence of Pw1.

In its Judgment, the trial court made a review of the evidence for the prosecution and that of the defence and concluded that it was beyond dispute that Pw1 had been raped. That fact was based on what Pw1 and Pw2 testified in court and the PF3 exhibit P1. As put

by the trial magistrate, the issue before the court was whether the charge of rape had been proved against the appellant. After reviewing the evidence of Pw1 regarding the rape incident, the trial court at pg. 3 of the judgment went on to state:-

> *"Be that as it may, I hold that the posed question as to whether the charge of rape is proved against the accused person is positively answered in that the same charge is proved beyond reasonable doubt."(End of quote)*

As already indicated, the appellant in his memorandum of appeal, has raised two main grounds. In principle he has complained that the case was not proved beyond reasonable doubt. He has strongly asserted that the failure by the prosecution to conduct an identification parade was prejudicial to the case since Pw2 and Pw1 contradicted themselves on material aspects of the case.

I have perused the record of proceedings and the judgment of the trial court. I have also considered the

evidence on record and the submissions by the learned state attorney referred to above, together with memorandum of appeal by the appellant. It is my considered view that there are very many issues which were not addressed to by the trial magistrate. I will try to elaborate on the discrepancies which tend to render the evidence by Pw1 and Pw2 suspect.

According to the medical report on the PF.3 exhibit P.1., it cannot be denied that Pw1 was raped. It was her first time to have sexual intercourse and the report indicates that she had sustained –

- 'Bruising 1 x 2 cm. vaginal lower part'; that was described as harmful.
- The type of weapon used was "penile penetration".

As already indicated, Pw1 was raped. The crucial issue here is who was her rapist? A close reading of the evidence of Pw1 and Pw2 immediately before and after the incident shows that the two witnesses were not familiar or known to their assailant. When they reported on the incident, they did not give any

description of the attire which their assailant had been wearing at the time of the rape. Although each of them stated that the appellant had a big scar on the head, they did not give details of the same to try to indicate on which part of the head that scar was. Pw1 on her part stated that the appellant had donned a hat and that he had a big scar on his face. Pw2 does not state to have seen the appellant donning a hat. Secondly, and as argued by the appellant in his memorandum of appeal, Pw1 asserted before the court that the appellant carried a big stick. Pw2 on her part stated that the appellant had a big stick, a knife and something which looked like a firearm. These are differences in the statements of two important witnesses. It could be argued for the sake of it that one of them was more vigilant and observant than the other. However, in view of the seriousness of the charges facing the appellant, those different versions can not be lightly ignored. In a way, the learned trial magistrate did not appear to have noticed them. Pw1 was a child of tender years. So was Pw2. Under the circumstances of this case, the learned trial magistrate

should have sought for material corroborative evidence before acting on their assertions.

Further, the persons to whom the description of the appellant was first given were not summoned to testify. There is no evidence regarding the manner and circumstances prompting the arrest of the appellant. The incident took place on 10/01/2006 and the appellant was arrested and brought to court on 18/04/2006. Thus there is a glaring gap between the date when the incident of rape was reported (if ever it was) and the arrest of the appellant.

In the case of ***Bushiri Amiri Vs. Rep. (1992) TLR 65*** the Court held { Mrosso, J. (as he then was)} that-

> '**Held** – (i) *The two witnesses ought to have given a detailed description of the appellant to the persons to whom they first reported about the theft before they had a chance of seeing the appellant after he was arrested; the description would be on say appearance, colour, height and on any peculiar mark of identity;*
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> *(ii) in every case in which there is a question as to the identity of the accused the fact of there having been a description given and the terms of that description given are matters of the highest*

importance of which evidence ought always to be given; first of all, of course, by the person or persons who gave the description and purport to identity the accused, and then by the person or persons to whom the description was given – rex v. Mohammed bin Allui (1942) 19 EACA72.

(iii) ... ...

(iv) ... ...' end of quote.

As it is, there are doubts in respect to whether the two witnesses ever reported the same. If the answer is in the affirmative, there still remain un-answered issues relating to the delay in effecting the arrest of the culprit if his identity was as the witnesses would like us believe. It was stated in evidence by the two prosecution witnesses that the offence took place on 10/01/2006. According to the Court record, the appellant first appeared in court to answer the charges of rape on 18/04/2006 - exactly some three months and one week after the alleged rape. The investigating/arresting officers were not summoned to give evidence to shed light on the identification of the suspect by the witnesses. Similarly the persons to whom the description of the suspect was first made

were not summoned to give evidence in court. In this aspect, the prosecution muzzled its own case.

As already indicated, Pw1 was a victim of rape. She gave evidence after the court had conducted a voire dire to establish her knowledge of truth and falsehood. Pw2 similarly was a young person, and as it is, her evidence should have been taken with caution. I do not agree with the trial magistrate when he simply stated that the evidence of Pw2 afforded corroboration to that of Pw1. He did not administer the necessary caution and he did not deal with the major discrepancies that were inherent in the evidence of the two prosecution witnesses.

The law regarding offences of rape and the like has always been that there should be corroborative and credible evidence. In our instant case, the evidence implicating the appellant is that of the victim, who as we have seen, is a child of tender years. The trial court treated Pw2 as an independent witness, without addressing its mind to the fact that this witness was also a young person, who unfortunately as I have

indicated, gave evidence which was riddled with serious discrepancies. The learned trial magistrate made no effort whatsoever to address the glaring discrepancies and as such, this court cannot but differ with trial magistrate. In the instant case the trial magistrate was not aware of the need to look for corroboration and as indicated, he did not in fact look for it. It is a trite principle of law that in all criminal cases, any doubt which exists in the prosecution's case has to be resolved to the benefit of the accused person.

For the foregoing, this Court finds it very unsafe to uphold the conviction and sentence entered against the appellant. The convictions are quashed and sentences set aside. The appeal is allowed in its entirety. It is so ordered.

Lyimo, J.

At Bukoba
21/11/2007