IN THE HIGH COURT OF TANZANIA

AT DODOMA

APPELLATE JURISDICTION

DC CRIMINAL APPEAL NO. 107 OF 2008
(ORIGINAL CRIMINAL CASE NO. 8 OF 2008
OF THE DISTRICT COURT OF DODOMA AT DODOMA)

OBEID S/O MWALUKO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

4/11/2009 & 18/12/2009

JUDGMENT

HON. MADAM, SHANGALI, J.

The appellant namely **Obeid s/o Mwaluko** is appealing against the decision of the Dodoma District Court in Criminal Case No. 8 of 2008. In that case the appellant was charged with the serious offence of Rape contrary to section 130 and 131 (a) of the Penal Code as amended by 1998, Act.

After the trial, the appellant was convicted and sentenced to suffer thirty (30) years imprisonment with twelve (12) strokes of the cane. Being aggrieved and dissatisfied with that decision the appellant has employed the legal services from Rweyongeza and

Company, Advocates and filed this appeal in order to challenge the decision of the trial court.

Before I go further on the grounds of appeal and submission made by both sides I find it opposite first to give a brief outline of the evidence which led to the conviction and sentence of the appellant.

In the night of 18.12.2007 at about 9.00 p.m. PW1 Imakulata Asheri (the victim) was on her way along Bahi road to Majengo area. When she reached at the railway line she saw two young boys. She was able to identify the appellant due to the tube light from a nearby grinding machine. She also insisted that the appellant used to be her customer when she was working at Snake Bar. PW1 claimed that suddenly the other boy moved aside and shouted to the appellant;

> *"Maliza unaremba nini yule Demu uliyekuwa unasema si huyu nishakulengesha."*

According to the evidence of PW1, the appellant hold her, squeeze her neck, pulled her to the korongo where he fell her down. Then the appellant undressed her and raped her by inserting his penis in her vagina by force. PW1 stated that she shouted for help and after about thirty minutes PW2 appeared with a torch and the appellant fled away. She stated that she was later

taken to the police station where she obtained a PF3 (Exhibit P1) and went to hospital.

PW2 stated that he heard PW1 cries from the korongo and when he went nearby he found the appellant wearing his trouser while PW1 wearing her under wear. He claimed that when he questioned PW1, she replied that she had been raped by the appellant but when he attempted to question the appellant, the later became infuriated, insulted him (PW2) and went away to the korongo.

PW3, Detective Coplo Mashaka who investigated the case testified that when he interrogated PW1, she stated that she was raped by the appellant who had a habit of seducing her especially when she was working at Atlantic Bar. He claimed that he is the one who issued PW1 with a PF3 on 20.12.2007. He also tendered the same PF3 before the trial court which was marked exhibit P1. The appellant objection to the admission of Exhibit P1 was rejected by the trial Resident magistrate.

In his sworn defence, the appellant raised an alibi defence and claimed that from 16.12.2007 to 18.12.2007 he was at Mpwayungu auction market where he went to buy some cereal for his employer Laurent Hoya. That on 31.12.2007 when she was selling the cereal at majengo the police arrived with one disabled girl and one Zebedayo Ndahani who was his enemy. The appellant

claimed that Zebedayo Ndahani pointed at him and the police arrested him. The appellant denied to have committed the offence and insisted that the case was fabricated against him. DW2, Bakari Ibrahim supported the appellant's defence and stated that from 16.12.2007 to 19.12.2007 they were at Mpwayungu market (Mnadani) buying and collecting cereal. He stated that the cereal was stored in his house which is close to the market place. He insisted that on 18.12.2007 the appellant was not in majengo area within Dodoma township.

The trial Resident Magistrate was impressed and satisfied with the prosecution evidence. He rejected the appellant defence and convicted him.

In his memorandum of appeal the appellant through his advocate Mr. Nyabiri from Rweyongeza and Company, Advocates listed only one ground of appeal, namely, that the trial court erred in law and fact in deciding that there was sufficient evidence to prove the case against the appellant beyond reasonable doubt.

During the hearing of the appeal Mr. Nyabiri expounded his main ground of appeal and submitted as follows. In the foremost he claimed that the appellant was not properly identified because there was no sufficient and conducive conditions for proper identification. The offence was committed in the night and in the so called Korongo. He argued that although PW1 claimed that he identified the appellant due to the tube light from the grinding

machine and that she knew the appellant before the incident because they used to meet at Snake Bar, there was no evidence to establish the type of the tube light, the veracity of the light from the tube nor the distance from the tube and the scene of crime. Mr. Nyabiri stated that it was incumbent upon PW1 and PW2 to explain in detail the illuminated area by the tube light, taking into consideration that PW1 stated that PW2 appeared with a torch. Even PW2 conceded that he used a torch in that night. Mr. Nyabiri argued that, the fact that PW2 used a torch means that there was no enough light from the alleged tube. He stated that visual identification must be strictly proved to eradicate all possibilities of mistaken identity. He referred to the cases of **Malonda William and Mahagila Mlimi Vs. Rep. Criminal Appeal No. 256/2006 (CA)** Dodoma Registry (unreported), and the famous case of **Waziri Amani vs. Rep (1980) TLR** – where it was held that the evidence of visual identification is of the weakest kind and most unreliable which should only be acted upon cautiously when the court is satisfied that the evidence is watertight and that all probabilities of mistaken identity are eliminated.

Mr. Nyabiri further argued that the record of proceedings is clear that PW1 failed to mention the name of her assailant to PW2 and other people who responded. He stated that although PW1 claimed that she managed to identify the appellant by face and clothes, she totally failed to give any further description of the face and clothes. Mr. Nyabiri contended that such description are matters of highest importance in order to establish proper visual

identification. He cited the case of **Rashldi Alli vs. Rep. (1989) TLR 97** where it was held that description, and the terms of that description on identification of the accused are matters of the highest importance of which evidence ought to be given.

Regarding to the PF3, Exhibit P1, Mr. Nyabiri submitted that it was wrongly admitted in court contrary to section 240 (3) of the Criminal Procedure Act, because the appellant was not given his right to call and examine the doctor who filled it and was neither read and explained to him. Secondly, Mr. Nyabiri contended that the same exhibit which was produced by PW3 the investigator of the case is not telling the truth because it was issued by the same PW3 on 20/12/2007 while the rape was committed on 18.12.2007. he questioned whether the alleged spermatozoa would have been swimming in PW1's vagina for two days. Mr. Nyabiri further stated that the trial Resident magistrate failed to consider the appellant's defence of *'alibi'* which raised several doubts because he (appellant) was at Mpwayungu market with DW2 purchasing and collecting cereal t the time when the alleged offence was being committed.

Ms. Mdulugu, Learned State Attorney who represented the respondent/Republic refused to support the decision of the trial Resident Magistrate. She decided to sail the same boat with Mr. Nyabiri, learned advocate. Ms. Mdulugu, supported the appeal and submitted that there was no sufficient prosecution evidence to prove the case against the appellant. She stated that there was no evidence to show that PW1 was working at Snake Bar or Atlantic

bar as claimed. She contended that from the evidence on the record it is doubtful if PW1 was actually familiar with her assailant. On the issue of identifications she conceded that there was no evidence to prove the availability of conducive conditions of identification in that night. She concurred with the defence counsel's submission and cases referred to on this issue. Ms. Mdulugu also expressed her doubts on the accuracy and legality of exhibit P1 which was produced and admitted in court contrary to section 240 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2002. She also conceded that despite of the fact that the procedure was faulted in admission of exhibit P1 (PF3), the same indicate that it was filled on 18.12.2007 while it was issued by the police (PW3) on 20/12/2009.

Indeed under section 240 (3) of the Criminal Procedure Act, it is mandatory requirement for the court to inform an accused person of his rights to have the doctor summoned for cross-examination. In this case that requirement was much so because the appellant challenged the PF3 – See **Nyambuga Kamoga v R. Criminal Appeal No. 9 of 2003** (unreported).

This being the first appeal I took pain to scan the evidence of each witness on record in order to appease myself on whether the conviction is surely supported or justified by the evidence on record. Having done so and having heard the strong submissions supported by law and facts from the learned advocate for defence and

supported by the learned State Attorney, I am convinced that this appeal is meritorious. In short the learned counsels have said it all.

In fact, I may add that the shortfall in the prosecution case was even appreciated by the prosecutor and the trial Resident Magistrate during trial, when the case was called for continuation of hearing on 24.07.2008. On that date the proceedings indicate as follows:

> ***"PP:-*** *Your honour the case is for hearing but I have no witness. I leave to the court.*
>
> ***COURT:-*** *Let the prosecution case be closed. As I see they are not serious in producing witnesses while the accused attend daily. And prosecution did not produce enough witness.*
>
> ***RULING***
>
> *Due to the evidence adduced, I am satisfied that the accused person have a case to answer.*
>
> *Sgd. E. Mrangu – RM*
>
> *24.07.2008"*

The above observations from both the prosecutor and the trial Resident magistrate indicate that they were both sure that further

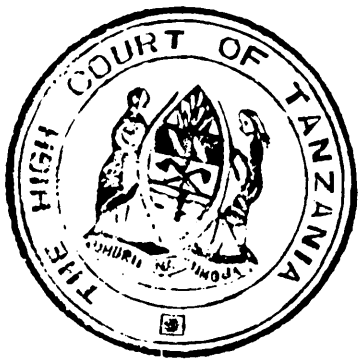
and particular prosecution evidence was required in order to prove the case beyond all reasonable doubt. The doctor who filled exhibit P1 (PF3) was not brought to testify despite of several trial court's orders.

Another unhealthy part in the prosecution case is the contradictions in the evidence of PW1 and PW2. PW1 claimed that when PW2 arrived at the scene with a torch, the appellant took to his heels, but PW2 testified that when he reached at the scene he found both PW1 and appellant putting on their underwears. Then he questioned PW1 and later the appellant. The appellant turned wild, insulted him and disappear to the Korongo. Such contradiction in serious and complicated offences like rape can not easily be brushed aside. Furthermore, it is difficult to understand what exactly PW1 meant when she said she was pulled to the *"Korongo."* PW2 also talked about *"Korongo"* and that the appellant disappeared to the *"Korongo."* Further explanation was required to understand the alleged *"Korongo"* specifically in the determination of the issue of identification and light available.

It is on the basis of the foregoing that it was wrong on the part of the trial Resident magistrate to convict the appellant on weak and unreliable prosecution evidence.

The appeal is hereby allowed, conviction against the appellant is quashed, sentence of thirty (30) years imprisonment and twelve (12) strokes of the cane is set aside. The appellant is to be

released and set free immediately unless otherwise lawfully held on another matter.

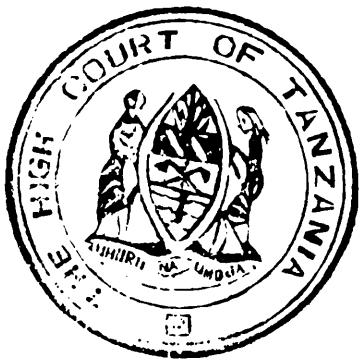


M.S. SHANGALI

JUDGE

18.12.2009

Judgement delivered in the presence of Mr. Wambali, learned State Attorney for the respondent/Republic and Mr. Nyabiri, learned advocate for the appellant. Appellant in person.



M.S. SHANGALI

JUDGE

18.12.2009