IN THE HIGH COURT OF TANZANIA

AT IRINGA

APPELLATE JURISDICTION

(Iringa Registry)

(DC) CRIMINAL APPEAL NO. 24 OF 2013

(Originating from Criminal Case No. 14 of 2012

of the District Court of Ludewa District

at Ludewa

Before F.R. Lukuna – R.M.)

ALEX MSIGALA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

1/8/2014 & 29/8/2014

JUDGEMENT

MADAM SHANGALI, J.

The appellant ALEX MSIGALA was charged with the offence of Rape c/s 130 (1) and 131 (1) of the Penal Code as amended under Act No. 4 of 1998 before the District Court of Ludewa at Ludewa. The trial District Court found the appellant guilty and convicted him to serve a term of 30 years imprisonment. Aggrieved by both the conviction and sentence,

the appellant has preferred this appeal intending to challenge that decision of the trial District Court.

The appellant based his appeal on six grounds of appeal which can conveniently be summarized into one major ground namely, the evidence against him did not prove the case against him beyond shadow of doubt. He complained on insufficient evidence to support his identification, lack of evidence to corroborate the testimonies of PW1 and PW2, relying on caution statement which was recorded contrary to the law and admission of hearsay evidence of PW3.

Briefly, the evidence upon which the conviction of the appellant was founded was that, on 13/6/2012 at 16 hours Scola Mwinuka (*PW1*) a young girl of 13 years old and a student of Lupefu Primary School went to collect firewood and to cut matete (*bamboo tree*) at her grandfather's farm. She was in the company of one Jennifer Mwinuka (*PW2*) aged 12 years and a student of Lugarawa Primary School. While in that exercise they were approached by two men who put them under arrest while accusing them for cutting the bamboo trees and stealing yams. In her testimony PW1 stated that one of the men was the accused person who asked them "*unakubari kumpatia kidudu yule au kwenda kituoni*". PW1 stated that they both refused and the appellant started to attack them, undressed them and each of them started to rape them. She clarified that the appellant was the one who raped her while

Jennifer was raped by the other man. She stated that the appellant put his penis in her virgina and she saw "*makamasi kamasi*" coming out of her virgina. PW2 testified to the effect that they were approached by the appellant and another person who wanted to have sex with them or to be taken to the police station for stealing bamboo trees and yams. That when they refused the appellant undressed them and started to rape PW1. That after that exercise the appellant and his colleague warned PW1 and PW2 not to reveal the incident to anybody otherwise they will turn into ghosts. Then the appellant and his colleague went away and PW1 and PW2 picked their firewood and proceeded home.

PW1 testified that when they reached home they informed their parents and their parents suspected the workmen of one Mwakisu, the owner of the Kinyungu area. According to the evidence of PW3, Exevery Mwinuka, the little girls arrived home late at 18 hours while crying and when they were questioned by their mother they stated that they were beaten by certain people when they were collecting firewood and cutting matete at Kinyunguni. PW3 stated that the girls complained that they were raped. He stated that it was their grandfather who said that the said Kinyungu belongs to Mwakisu and the attackers must be his workers. The appellant who was working for Mwakisu was arrested along with his colleague, taken before PW1 and PW2 who managed to identify them. The appellants were taken to the police

station where PW1 and PW2 were given PF3 for medical examination. PW1 was medically examined by PW5, Dr. David Mwakalago who discovered that PW1 had bruises on her private parts caused by a blunt object. The said PF3 was admitted in court as exhibit P2.

The investigator of this case was D/Cpl. Kulwa (*PW4*) who stated that he received the appellant together with PW1 and PW2 at the Police Station. That he was told that it was the appellant who raped PW1 and therefore he issued PF3 for PW1 only. According to his testimony the appellant had injuries on his hand and during interrogation he was the one who mentioned his colleague as one Richard Msemwa. Then on 14/6/2012 PW4 sent police officers to arrest Richard Msemwa and recorded their cautioned statements. In his cautioned statement the appellant was recorded to have raped PW1.

In his sworn defence the appellant categorically denied to have raped PW1. He started by challenging the evidence of PW1 and PW2 on the issue of identification stating that the two girls were told by PW3 that he was the one who raped PW1. He also complained that the case was framed against him because he had conflicts with PW3 having refused to work in his shamba. He claimed that he was picked home on 13/6/2012 by PW3 who lured him to the club and started to accuse him for raping PW1. He also stated that when PW1

was medically examined by PW5 she was not found with any sperms in her private parts. He complained further that while at the police station he was beaten for three days.

Based on the testimonies of PW1, PW2, PW3, PW4 and PW.5 the trial District Court convicted and sentenced the appellant as stated above.

In the hearing of this appeal the appellant appeared in person and unrepresented by an advocate while the respondent/Republic was represented by Mr. Alex Mwita learned State Attorney.

In his short oral submission the appellant insisted on his innocence and stressed that there was no sufficient prosecution evidence to convict him. He prayed this court to allow his appeal and set him free.

Mr. Alex Mwita, learned State Attorney supported the conviction and sentence. He submitted that there was sufficient prosecution evidence against the appellant to establish his guilty beyond any reasonable doubt. Starting with the issues of identification, the learned State Attorney submitted to the effect that the appellant was identified by both PW1 and PW2. He argued that although PW1 and PW2 admitted that it was their first time to see the appellant, the condition of identifications were favourable because the

incident happened during the day. He cited the famous case of **Waziri Amani Vs. R.** (*1980*) 250. Mr. Mwita argued that there was no need of identification parade because the accused persons were identified by the victims. He admitted the fact that there were no description given by PW1 or PW2 but contended that there was no room for mistaken identity.

On the issue of requirements of corroboration evidence to support the evidence of PW1 and PW2, Mr. Alex Mwita conceeded that PW1 and PW2 were both children of tender age and therefore their evidence required corroboration evidence. However, he argued that basing on Section 127 of the Evidence Act, the trial court was satisfied that they were truthful witnesses because they told the same story.

Regarding to the complaint that the trial District Court based its decision on the hearsay evidence of PW3, Mr. Alex Mwita countered that the conviction of the appellant was based on the evidence of PW1, PW2, PW5 and there was no evidence to establish any standing conflicts between the appellant and PW3.

Touching on the appellant's cautioned statement Exhibit P.1, Mr. Mwita submitted that the cautioned statement was received as a voluntary document after the conduct of the trial within trial. Nonetheless, Mr. Mwita conceeded that the

cautioned statement was recorded out of time because the appellant was arrested on 13/08/2012 and the same recorded on 14/08/2012 contrary to Section 58 of the Criminal Procedure Act. He finally asked the court to consider the other available and strong prosecution evidence and find that the alleged irregularities are curable.

The prosecution evidence in this case appears to be strong and attractive especially when one tends to believe the evidence of PW1 and PW2 wholly. These two little girls were indeed approached, arrested, assaulted and eventually raped by two thugs. Both being children of tender years were subjected to voire dire examination. Indeed the trial Resident Magistrate used extra care to comply with Section 127 (2) of the Evidence Act and conducted voire dire examination test in order to ascertain whether or not they knew the nature of oath or whether they possessed sufficient intelligence to justify the reception of their evidence and whether they understand the duty of speaking the truth. The trial District Court record of proceedings indicate that PW1 was correctly questioned and although she gave several contradicting answers, she finally admitted that she does not know the meaning of an oath. As a result the trial court recorded her evidence without an oath because she possessed sufficient intelligence to justify the reception of her evidence and understand the importance of telling the truth but she did not understand an oath. In my

understanding the trial Resident Magistrate complied with Section 127 (2) of the Evidence Act.

Regarding to PW2, there was equally intense voire dire examination which resulted to the findings that she possessed sufficient intelligence and understands the nature of an oath and importance of telling truth hence allowed to testify on oath. Section 127 (2) of the Evidence Act was equally complied with. A careful perusal of the record shows that as far as the issue of rape is concerned there was no need of further corroboration evidence considering the requirement of Section 127 (7) of the Evidence Act and in addition the evidence of PW.5 and Exhibit P2.

Much as I agree with Mr. Alex Mwita that the conviction of the appellant was based on the evidence of PW1, PW2 and PW5, he should not forget that the identification and arrest of the appellant was solely based on the hearsay evidence of PW3 plus assumptions fetched from the two little girls' grandfather. I agree with the learned State Attorney that the cautioned statement of the appellant has no evidential value having been recorded contrary to the law – See the case of **Peter Kidole Vs. Rep.**, Criminal Appeal No. 69/2011 (CA) Iringa Registry (*unreported*).

All in all, and as I have pointed out above there is no much outcry in reaching a conclusion that there was sufficient

prosecution evidence to support the allegation of rape but my big problem in this case is whether there was sufficient and credible evidence to establish that the alleged offence was indeed committed by the appellant.

The available evidence indicate that the offence was committed during the day. Both PW1 and PW2 admitted that it was their first time for them to see the alleged two thugs who attacked and raped PW1. They were therefore total strangers. When they (*PW1 and PW2*) reached home they were crying and did not give any description or clue about the nature, physical appearance, features, attire or anything to lead PW3 and his people to start the hunting of the appellant and his colleague. According to the testimony of PW3, it was the two little girls grandfather who suspected the workmen of one Mwakisu who was also a Village Executive Officer (VEO). In his own words the PW3 stated;

> *"As we continued interrogating them they said that they put them under arrest and raped them. After that their grandfather said that the Kinyungu was for Mwakisu. We saw the Chairman and went to VEO. We found the VEO workmen. Our children managed to identify the accused persons .... We took the accused person to the police station."*

That evidence indicate that the appellant and his

colleague were arrested because they were the workmen of VEO who owns the so called Kinyungu where the two little girls were ravished. The appellant was not arrested because he was identified by the victims. He was not arrested because the victim mentioned him or gave any description or clue leading to his arrest.

This unhealthy scenario was also reflected in the record of proceedings during voire dire examination against PW1. When she was questioned about the appellant she respondent as follows:

> COURT: Do you know the accused person in court?
> PW1: I don't know the accused person in court.
> COURT: Do you know a person called Alex Msigara?
> PW1: I don't know him and that name I don't know it.
> COURT: Have you seen him before?
> PW1: I have not seen him before.

With such a response, can one seriously say there was an accurate virtual identification by PW1 at the scene of crime. In my considered opinion there was a need of corroboration evidence by way of conducting an identification parade before charging the appellant. It has been stated and emphasized time and again that the evidence of virtual identification can safely be relied upon when all possibilities of mistaken identity have been eliminated and the court is satisfied that the

evidence before it is absolutely watertight. See the standards laid down in the case of **Waziri Amani** (*Supra*). In another case of **David Panyako & two others Vs. Rep**. Criminal Appeal No. 127/2011 (CA) Mwanza Registry (*unreported*) the court cited several decisions touching on the same subject matter of virtual identification and found that though the condition of identification in broad day light might appear ideal, there was a complete absence of evidence on record to establish that the appellant was adequately identified.

I have much reservation on the evidence of PW3 and part played by him in this case especially during the arrest of the appellant. In his testimony he claimed that both appellant and his colleague were arrested on 13/8/2012 and identified by PW1 and PW2 and then marched to the police station. In fact according to the testimonies of PW1 and PW2, the appellant and his colleague were arrested and brought to their homestead where they identified them. However, PW4, the D/Cpl. Kulwa, the investigator of this case stated that the accused/appellant was brought at police station by a group of people alone and it was during interrogation when the appellant mentioned his colleague as one Richard Msemwa. As a result, Richard Msemwa was arrested on 14/8/2012.

Considering such contradictions one may correctly say sometimes the conditions of identification might appear ideal

but that is no guarantee against untruthful evidence leading to mistaken identity.

In the light of the above analysis and findings I find merit in this appeal and satisfied that the guilty of the appellant was not proved beyond reasonable doubt. The appeal is hereby allowed. The appellant's conviction is quashed and sentence set aside. I order for the appellant's release from custody forthwith unless otherwise lawfully held on a different matter.

M. S. SHANGALI

JUDGE

29/8/2014

Judgement delivered in the presence of Mr. Mwenyeheri, learned State Attorney representing the respondent/Republic and the appellant present in person.

M. S. SHANGALI

JUDGE

29/8/2014