IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLANT JURISDICTION

(Tabora Registy)

(DC) CRIMINAL APPEAL NO. 66 OF 2013

CRIMINAL CASE NO. 342 OF 2006

OF THE DISTRICT COURT OF KIBONDO

BEFORE :- T.S.A. MTANI Esq. DISTRICT MAGISTRATE

SOSTENES MYAZAGIRO NYARUSHASHI .....APPELLANT
(Original accused)

VERSUS

THE REPUBLIC.....RESPONDENT
(Original Prosecutor)

JUDGMENT

29th Dec 2013 and 04th Feb 2014

S.M.RUMANYIKA, J

Sostenes s/o Myazagiro @ Nyaluchashi (appellant) herein, appeals against conviction and sentence of thirty years in jail for the offence of armed robbery c/s 287 (a) of the penal code cap. 16. As amended by Act No. 4 of 2004. Mated on him on 5/5/2008 by the

District Court – Kibondo (trial court) the bulky three (3) grounds may, if condensed read:-

(1) Failure by the trial magistrate not to ignore the evidence of visual identification by Pw1 and Pw2. As there was no proof that they mentioned the appellant immediately.

(2) Error in law and in fact by the trial magistrate. Whereby accepting the evidence of the material doctor in charge – Kibondo. Showing that the appellant was not in bed thereat between 18 – 22/11/2006 (inclusive of the material date).

(3) Error in law and in fact by the trial magistrate. Having convicted him under the doctrine of recent possession. Whereas Kitenge allegedly stolen in the incident was not tendered in evidence.

The appellant appears in person. Mr. D. Rwegila learned state attorney appears for the respondent Republic.

Whereas the appellant had nothing on the hearing date to submit, Mr. Rwegila wholily supported the appeal. In that the prosecution evidence of recent possession of the stolen kitenge was shaky (not tendered in evidence). And so was the evidence of visual identification at the material 01.00 hours. Given the source of light (a mere laten lamp) and or torch. Although the appellant was a village

mate known to Pw1 and Pw2 before. Leave alone trite law that no person casting the torch light can be visually identified at night by a person being casted.

That the said Pws never disclosed name of the assailant until then the appellant's wife was found in possession of the alleged kitenge stolen in the event. Further submitting, the learned state attorney stated that the witness's ability to name a suspect assures one's credibility. But an un explained delay should put a prudent court in doubts. The appellant was arrested four (4) days later. That the case was poorly investigated. No search was even conducted tracing the alleged stolen property. Submitted the learned state attorney not supporting the conviction.

It is evident in a nut shell, but not running any risks of missing a point, that on 21.11.2006 at about 01.00 hours, a gang of five (appellant and others) stormed in. They threatened, assaulted and demanded some money from Pw1 and Pw2. Leave alone Pw3, father of Pw1. The 1st two surrendered all. But also were raped by the thugs. The copies of material PF3 issued to Pw1 and Pw2 were admitted as exhibit P1 and P2 respectively. Before the thugs took on their heels with such assortments of goods totally valued at shs. 93,500/=. However, the Pws were able, and they identified them all. With the aid of a laten lamp therein and torch that the culprits had. Leave

alone a muzzle gun. With which they had just scared one by shooting in the air. But just about a month later, the appellant's wife was found possessing a piece of Kitenge also allegedly stolen in the very incident. However, as we shall see later, this crucial documentary evidence was not tendered as exhibit in court.

On his part, the appellant disowns the prosecution story. Unsuccessfully though, he merely pleaded having been hospitalized, and laid in bed in the hospital around for about five (5) days. Inclusive of the alleged material day and time. But arrested, in connection with the charges, quite on 22/11/2006 in bed at his home. That is hardly a day after the material incident. That is it.

In fact the central issues could be two: (i) whether the appellant was properly identified (ii) whether there was ample evidence sufficient to ground conviction.

Acquitting the appellant from the charge of rape, the learned trial magistrate reasoned, with due respect misconceptually, that the appellant could not have practically hold a gun, rape Pw1, threaten Pw2, and also steal the money and such assortments of goods simultaneously. The learned trial magistrate should have known that given the circumstances, whereby the Pw1 and Pw2 were now in terror, one could rape quite smoothly. Leave alone such doctrine of

common intention. Indeed raping by the appellant of the mother and daughter was as possibly simple as skeeing.

However, and this is trite law, the evidence of visual identification at night is the weakest kind of it. Sincerely, given all the circumstances of the case, thugs storming in at the midnight, shot in the air scaring any potential intervenors, and sort of demanding property with menaces. All this taking place only under a laten lamp of whatever light intensity might be, without explanation how the room walls were refractive/reflective, obviously the issue of proper or improver visual identification cannot arise. After all it is next to impossible for the two Pws now being terrored by the violent thugs just storming in, to lite a laten lamp, if anything presumably getting prepared to visualize without mistakenly identifying the thugs. And possibly confront the same it would be quite a different scenario was the lamp on before the thugs arrived. But this one, according to the evidence available, not the case.

Nevertheless and I am convinced, that by coincidence, the Pws mentioned the appellant. Indeed he was the one. I am saying so for the five (5) obvious reasons:-

One; he was arraigned hardly a day after the material incident. **Two**; the appellant's defence of alibi was proved futile and infact a forged documentary. It is cardinal principle that no accused in criminal

justice has onus to prove his innocence. Granted! But the appellant did not, on that aspect of evidence, even raise any reasonable doubts in his favour. Having his purported admission/registration card in hospital rejected. He was duty bound to prove without doubt, his defence of alibi. There was great chances of him getting in court one of his wod mates and or the material wod attendant. Much as he was arrested and charged only a day after he had been purportedly discharged from the hospital. **Three**; the two Pws (daughter and mother) had nothing peculiar to scandalize themselves as being the victims of the shameful and barbaric gang rape. **Four**; The trial court was satisfied that the Pw1 and Pw2 were, the victims of gang rape of the material night. To borrow the words of the learned trial magistrate, very difficultly though, because were not free from a massive linquistic barrear, the record speaks loudly:-

..... the accused person was among of the mob of peoples attacked them it is true they raped according the medical report, but it is true that act done by this accused person alone. May be because that act is shocked them, so everything done to that area they mentioned the accused being done even if it is not.

Five; the appellant bothered not to address the issue of a piece of Kitenge allegedly stolen in the material incident, but still found hardly a month later being possessed by his own wife. Although the

Kitenge was, for reaons known to the prosecution, and perhaps to the trial court, not tendered in evidence.

There could be some trivial short comings on the part of the prosecution case yes! But yet it is cardinal principle that the prosecution are not bound to disprove every assertions made by accused. because no interests of the society would be protected by the law if whatever slight doubts on the guilty of a subject were to guarantee one an acquittal (case of Miller V. Minister of Pensions (1947) 2 All ER 372), Lord Denning.

In deed the charge of rape as said before, was respectfully proved sufficiently against the appellant. Except the charge of armed robbery. For which I think if anything, the conviction was based on the doctrine of recent possession in respect of the said piece of kitenge. Moreover, this item is alien to the material charge sheet frankly. It cannot, based on it, ground a conviction. The material particulars of offence on the charge only talk about a "bag of clothes". What were the clothes? One ought have mentioned it categorically. Amongst the other assortments of goods swept away. Much as the charge sheet makes a total of shs. 93,500/=. Being value of the items stolen in the incident. This implies therefore, that the value of each individual items stolen was clearly established. In which case therefore, the kitenge should have been enlisted specifically.

Just a word or two in passing. As said, though the short coming avails no relief to the appellant. Whereas the evidence on record tells that too, the mother (Pw2) was raped along with Pw1 in the material night, for reasons known to the investigations officer, the charge sheet excludes the former as victim. I hope the prosecution will, soon or just later, feel obliged to do whatever ought have been done by them.

In the up short, had the learned trial magistrate considered all the aforegoing, he would have reached at a different conclusion. The appeal is allowed. But in exercise of the powers conferred upon me under section 373 (1) (a) (3) and (4) of the Criminal Procedure Act, cap. 20 R.E 2002, I convict the appellant under section 130 (1) and section 131 of the penal code Cap. 16 R.E. 2002. As amended by section 5 (2) and (6) of the Sexual Offences Special Provisions Act No. 4 of 1998. I sentence him to 30 (year) w.e.f. 05.05.2008.

R/A explained.

S.M.RUMANYIKA

JUDGE

04/02/2014

Delivered under my hand and seal of the court in chambers this 4th February, 2014. In the presence of M/s Moka and the appellant.

S.M.RUMANYIKA

JUDGE

4/02/2014