IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CRIMINAL APPEAL NO 35 OF 2015

(Appeal From the decision of Longido District Court Criminal Case No 16 of 2013)

PROCHES GERVAS @ WHITE .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J.

This is the first appeal. In the District Court of Longido the appellant was charged with and convicted of the offence of Rape contrary to section 130 (2)(a) and 131(1)of the penal code cap 16,R.E 2002 .The particulars on the charge sheet alleged that on the 11th April, 2013 at about 0030hrs hrs, at Kisongo village within Longido District in Arusha Region, the appellant did have unlawfully carnal knowledge of one TRIFONIA D/O SWAI without her consent. Upon conviction, the appellant was sentenced to a term of 30 years imprisonment, 6 strokes of cane and to pay Tshs.100, 000/= as compensation to PW1.The trial court's decision is assailed by the appellant. He has preferred his appeal to this court on four grounds as follows-;

1. That, the learned trial magistrate erred in law and in fact by convicting and sentencing the appellant through the evidence of identification while the said evidence was not absolutely watertight.
2. That, the learned trial magistrate erred in law and in fact by convicted and sentencing the appellant relying on insufficiency evidence by the prosecution.
3. That, the learned trial magistrate erred in law and in fact when she failed to see glaring contradiction between PW1 and PW2.
4. That, the learned trial magistrate erred in law and misdirection herself by failure to accord due weight to the appellant's defence and decided the matter basing on the prosecution case on its own.

At the hearing of this appeal the appellant appeared in person to argue his appeal, while Ms.Twide learned State Attorney represented the respondent Republic. Arguing in respect of his grounds of appeal filed in court the appellant opted to start with the issue of identification, he said that when he cross examined Pw1 who was the victim of the offence she alleged that at the place where she was raped there was light but she did not tell the court the intensity of the light at the scene, he said on page 9 of the typed proceeding the witness did not tell the court as to the source of light or the distance between where the light was to where the incidence took place.

He further submitted that PW2 testified that there was light but could not also tell the intensity of light that was present at the scene, the witness could not further explain the distance from where the light was to where the incident took place. If the trial magistrate considered all these facts he would not have been convicted of the offence, it was his submission that

the evidence of these two witnesses was supposed to be corroborated by a person named Pius who is alleged to have arrived at the scene of crime and found him raping PW1, he said the fact that this witness was not called has created a lot of doubts on the prosecution witnesses, he said that PW2 alleged that the appellant went back to the scene of crime to provide assistance to the victim it was his view that this is not logical for someone to commit a crime and then go back to the scene of crime and get himself caught. Furthermore, the prosecution's witnesses could not explain to the court as to why he was not arrested at the scene while doing that act or after arriving at the victim's house.

He concluded that in his defence he testified that he was arrested on 13/04/2013, if he had actually done the act and go back to the scene of crime why was he then arrested on the next day, he said police decided to charge him with this offence just for the reasons known to them, he therefore prayed that his appeal be allowed and the court sets him free.

Responding to the appellant's submission MS. TWIDE learned State Attorney submitted that they do support the decision of the trial court for conviction and sentence, she said she will make submissions in totality of the grounds of appeal, she argued that the whole of the proceedings they are satisfied that there is a direct evidence against the accused person, the direct evidence is that of PW1 and PW2. On the testimony of PW1, although the act took place at night but the witness had spent time with the accused as they had a conversation before the act was done, the accused tripped PW1 and she fell, she tried to call for help and the appellant squeezed his neck. The accused took off her clothes and got on

top of her. Furthermore, the evidence of PW2 who said she saw the accused lying on top of the PW1 and explained the situation as it was there. The appellant's trouser was pulled down and PW1 was naked. PW2 also said there was light that made her see the appellant, she did not however explain the intensity of light that she used to see the appellant but on page 9 of the proceedings PW1 testified that there was a security light that helped her to see the appellant, she further argued that when PW2 arrived the appellant fled and left his "mgolole" the traditional piece of cloth. He also came back to the scene to collect his cloth and on page 7 the victim testified that the appellant was arrested when he went back for his cloth.

It was her argument that section 127(7) of the Evidence act provides that the evidence that can convict the accused on sexual offences is the evidence of the victim, she said with the evidence of the PW1 it was sufficient to prove the offence of rape as required by the law u/s 127(1) of the evidence, they prayed that the court considers the direct endoubtful evidence adduced at the trial which proved the offence of rape that the accused was charged with and convicted, she said that in his defence the accused did not adduce any evidence that would have created a doubt as to whether he actually committed the offence as charged. She therefore prayed that this appeal be dismissed.

In rejoinder the appellant has nothing new to tell this court he reiterated his submission in chief.

I have considered the appellant's memorandum of appeal as well as his oral submission and that of the learned State Attorney for the respondent the crucial issues raised in this appeal are visual identification and whether or not there was proof of penetration.

On the issue of identification, from the evidence on record there is no dispute that the crime happened during night in which the condition for proper identification was unfavorable and PW1 and PW2 were the only witnesses who testified to have identified the appellant at the crime scene on the eventful night , however they did not clearly stated as how they were able to identify the appellant unmistaken on that unfavorable condition, in her testimony PW1 said that when she arrived in front of her gate the appellant tripped her and she fell down, she tried to call for help but the appellant squeezed her neck, took off her clothes and got on top of her, she lost consciousness when she gained her consciousness she saw one man an PW2, when cross examined by the appellant how he identified him she stated that, she saw him when she was passing and stopped and that the place where she was raped had security lights,PW2 on her testimony on identification she also said that there were security lights which helped them to recognize the appellant that night.

The principles guiding the identification of the accused in unfavorable conditions are well explained in the famous case of **WAZIRI AMANI VRS REPUBLIC (Supra).** It was held:

(i) Evidence of visual identification is of the weakest kind and most unreliable.

(ii) No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.

The court in this case listed down some circumstances which a trial court should consider and analyze before coming at a conviction. The court observed:

> *".....Although there are no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identify, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions such as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not ".*

Again in the case of SAID **CHALLY SCANIA V. REPUBLIC, Criminal Appeal No. 69 of 2005** (unreported), the Court of Appeal held that;

> *".....We think that where a witness is testifying about identifying another person in unfavorable circumstance, <u>like during the night, he must give clear evidence which leaves no doubt that</u>*

the identification is correct and reliable. To do so he will need to mention all aids to unmistaken identification like proximity to the person being identified, the source of intensity.....'(emphasis supplied)

From the evidence of PW1 and PW2they did not explain in details on the intensity of the security light at the crime as a well as to whether they knew the appellant well before the incident or not? They ought to explain in detail as what made them to identify the appellant unmistakenly so as the court could be able to determine whether or not the condition were favorable for proper identification. It has been settled that visual identification evidence is of the weakest character and that before conviction is entered basing on such evidence it must be absolutely watertight.

Being mindful of the principle laid down in above cited cases and the circumstances of this case it is clear that the identification of the appellant at the scene of crime was not watertight so as to warrant a conviction, prosecution evidence left doubt as to the correct identification of the appellant therefore the benefit of doubt must be resolved in favour of the appellant.

Since the crucial issue in this appeal was identification of the appellant, but the evidence by prosecution witnesses left doubt then I will not discuss on the issue of penetration as even if the evidence on record will prove that there was penetration then it will not be the appellant who had raped the victim (PW1).

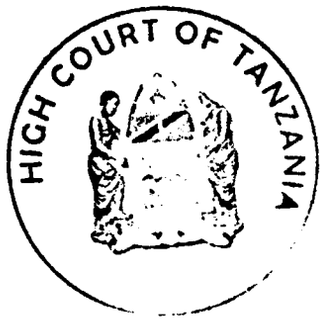
That said, I am of the view that the conviction and sentence entered cannot be supported by the evidence on record, I accordingly allow the appeal, quash the conviction and set aside the sentence, the appellant should be released from jail henceforth unless he is otherwise held for another lawful cause.

Appeal Allowed.

Dated at Arusha this 09th day of October, 2015

SGD
S. M. MAGHIMBI
JUDGE

I hereby certify this to be a true copy of the original.



Deputy Registrar
High Court
Arusha
27/10/15