IN THE HIGH COURT OF TANZANIA

AT BUKOBA

HC. CRIMINAL APPEAL No. 41/2017

(Arising from Original Criminal Case No. 22/2015 in the District Court of Bukoba)

ELIZEUS JOSEPH ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

8/3/2018 & 22/3/2018

KAIRO, J.

The Appellant in this matter was an accused at the District Court of Bukoba. He was charged and convicted of three offences:- rape c/s 130 (1) (2) (e) and 131 (1), stealing c/s 265 and burglary c/s 294 all of the Penal Code Cap 16 RE 2002. The accused was found guilty of all the offences charged with and sentenced to serve thirty years imprisonment. Determined to protest his innocence, he decided to file this appeal raising six grounds of appeal as follows:-

1. That the appellant defence was completely not evaluated or discussed.
2. That the Hon. Trial Magistrate erroneously acted on an inconclusively conditions of visual identification.
3. That the Hon. Trial court had failed to address points of determination as provided in the CPA Cap 20 RE 2002.
4. That the Hon. Trial court had wrongly considered exhibit P4 (ie accussed's caution statement) which obtained or recorded contrary to the CPA Cap 20 RE 2002 as well as its admission into evidence.
5. That the followed illegal search as was conducted in his absence and exhibit P2 (Certificate of Seizure) was wrongly admitted into evidence.
6. That the case against the appellant was not proved to the required standard.

The Appellant thus prayed the court to allow his appeal.

The Respondent Republic was represented by Mr. Njoka, the Learned State Attorney who opted to reply the grounds of appeal during the oral submission. The Appellant is self represented.

Briefly the background to this case is that; It was alleged that on 11/5/2015 around 1:00 am he unlawfully broke into the victim's house (Pw2) one Selestina Selestin, an old woman of over 70 years of age with an intention to commit offences therein. It was further alleged that after entering the house he raped the old woman, and stole her properties on the fateful date. That

the victim managed to identify the accused through the solar light. On the following day the accused was arrested and charged of the above three offences. He denied all of them. The Prosecution side paraded six witnesses out of which the court found that the accused was guilty. He was consequently convicted and accordingly sentenced as afore said. Hence this appeal to challenge the conviction and sentence.

When the parties were invited to submit orally, the Appellant preferred the State Attorney to start replying the grounds of appeal and that he will later make his rejoinder which arrangement the State Attorney didn't object. The court will be addressing the grounds of appeal as well as the reply by the State Attorney.

Mr. Njoka categorically informed the court that he was objecting this appeal. Starting with the first ground he stated that it was not true that the Appellant's defence was completely not evaluated. He argued that the cardinal principle in criminal cases is for the prosecution to prove its case beyond reasonable doubt and that even if the Plaintiff elect to remain silent, still the said duty stands. He concluded that the accused was therefore convicted basing on the evidence by the Prosecution and not the defence of the Appellant.

It is true that the obligation to prove the case is on the prosecution side regardless of whether the accused has given its defence or not. Thus the accused ought to be convicted on the strength of the prosecution evidence

and not otherwise [Refer the case of **Christian Kale and Another vrs R [1992] TLR 302.** It goes therefore that regardless of whether the Appellant's evidence was considered or not, the cardinal principle is that the burden lies on the prosecution side as rightly argued by Mr. Njoka. I thus find the first ground to lack merit.

In the second ground of appeal the Appellant has argued that the trial Magistrate erroneously acted on an inconclusive conditions of visual identification. The Learned State Attorney refuted this contention that it has no substance. He clarified that the victim (Pw2) used solar light and in explaining its intensity, Pw2 stated that the said Solar light was charged. He went on that, the victim knew the Appellant properly as he was their neighbor (proceedings page 17). The State Attorney concluded that according to the case of *Waziri Amani vrs R [1980] TLR 250* the victim (Pw2) identified the accused properly adding that Pw2 even mentioned his name, thus the identification was watertight.

According to record, the incidence occurred around midnight. In this circumstance the evidence that implicated the Appellant was based on identification. It is settled that the court has to satisfy itself that all elements of mistaken identity has been eliminated and that the evidence is absolutely watertight **[Refer the case of Waziri Amani** (supra) **and Mwalimu Ally and Another VR R; Criminal Application No 39/1991 CAT Dar es salaam** (unreported). The court through the case of **Waziri Amani** (supra) has stipulated factors to be considered when determining as to whether there

was no mistaken identity. These are; time the witness had the accused under observation, the distance at which the witness observed the accused, condition of the said observation and intensity of light and whether the witness has known or seen the accused before.

In the case at hand it was the victim (Pw2) who identified the Appellant. According to her testimony the victim testified that when the Appellant kicked her door and entered, she switched on the solar light which was before put to sun to charge. It means therefore its intensity was good enough to see the person clearly whom the victim mentioned to be Elizeus Joseph.

Pw2 further testified that the Appellant raped her from 1:00 midnight to 5:00 am that is about four hours. By any standard the time was long enough to properly identify her and according to the offence committed (rape) obvious the distance was very close (zero distance).

As to whether the victim knew the Appellant before, she stated that he was her neighbor that's why she even mentioned his name to Pw6 (proceedings page 16 – 17 and proceedings page 22). In the case of **Jaribu Abdallah vrs R; Cr Application No. 220/1994** the court among others observed as follows:

> *"In the matters of identification, it is not enough merely to look at factors favoring identification,.....the ability of the witness to name the offender at the earliest possible moment in our view is an assuring factor though not a decisive factor".*

The presence of all factors as per the case of **Waziri Amani** (supra) coupled with the early mentioning of the Appellant by the victim assured this court that the Appellant was properly identified. Thus this ground of appeal is bound to fail for lack of merit.

In rebutting the third ground of appeal whereby the Appellant has contended that the court had failed to address points of determination as provided in the CPC, the State Attorney dismissed the contention that it is not true. He submitted that at page 30 of the judgment, 3rd paragraph the court established points for determination though not expressively and further explained what the law provides with regards to the committed offences the Appellant was charged with. Mr Njoka went on that, the court at page 31 of the judgment gave points for determination connecting the same with the stolen things and the admission made by the Appellant. He added that if the court would find that points for determination weren't given directly, the court may order the proper writing of the judgment by the trial court.

Going through the judgment, the court has observed that the trial court did not expressively established or framed points for determination. However it was further observed that the court had them in its mind as rightly pointed out by the Learned State Attorney above and in fact addressed them properly. Looking at page 30 – 31 of the judgment, the court explained the legal ingredients of the offences committed and analyzed the evidence adduced with regard to the committed offences properly. Though the court

didn't give them expressively, but I am convinced the omission not to be fatal as long as the court knew them and addressed on them properly. As such I found no need to order re writing of the judgment. In this respect therefore the 3rd ground of appeal is with no substance.

As a reply to the 4th ground of the appeal, Mr. Njoka started by refuting the same. He submitted that Pw1 was the one who took the said cautioned statement and in his testimony he explained the procedures of taking the same. He went on that after objection from the Appellant, an enquiry was conducted to determine whether the same was freely signed by the Appellant adding that the Appellant gave his statement at the presence of his relative who testified as Pw2 during the enquiry and verified that the statement was freely given. (Page 9 proceedings). The State Attorney further stated that the Appellant had admitted to have stolen some properties in the victim's house. He concluded that the court was therefore satisfied that the statement was feely given and therefore the cautioned statement was admitted as exhibit P1 in the main case.

It is a legal requirement that once an accused person object to the admissibility of his cautioned statement as evidence at the trial, the court is legally bound to make an enquiry to ascertain as to whether it was given voluntarily or not before the court can admit it. The Appellant had contended that he was forced to sign and that he doesn't know the contents of the cautioned statement when the prosecution wanted to tender it. Thus the court had to conduct an enquiry. During the enquiry it was testified by

Pw1 that before taking it the Appellant was told all of his rights, besides the statement was made before the Appellant's relative and that the Appellant confessed to have stolen the things. Further that his relative came to testify as Pw2. He added that the Appellant wasn't forced to sign. Pw2 echoed what has been testified by Pw1. Pw2 also stated that, the statement was read over to the Appellant before he signed adding that the Appellant was not forced to sign it. The record further reveals that, the cautioned statement led to the discovery of the stolen properties of the Victim. In this regard therefore the court is convinced that the cautioned statement was properly admitted after the conduct of the enquiry and further that the trial court was correct to consider it as it was the source of the discovery of the stolen items. I thus found nothing to fault the trial court in its finding as far as the 4th ground is concerned. I further concede to Mr. Njoka's submission that even if the statement would have been improperly admitted (which is not the case) the fact that it led to the discovery of the stolen items, would have made it to be considered to have been valid as per the case of **Nanyalika vrs R [1971] HCD 314.**

In the 5th ground of appeal, the Appellant argued that the search was illegal as was conducted at the Appellant's absence and that the certificate of seizure was wrongly admitted as evidence. He clarified that the search was conducted on the same day he was arrested yet he was not taken to witness it adding that even the leaders were not present when the search was conducted. Mr. Njoka in reply stated that it is true that the search was

conducted in the Appellant's absence but that doesn't make the search illegal and no law provides for that requirement.

The State Attorney went on that the search was done at Pw3's house who testified that the Police arrived at his house and informed village leaders on the search to be done (page 19) and found the properties, which the Appellant himself mentioned. He added that even if the search would have been illegal, it doesn't preclude the court from admitting the certificate of seizure and search warrant as exhibits. He cited the case of *Shila vrs R [1968] HCD 39.*

In this argument, I join hands with Mr. Njoka's submission. It is true that there is no law that which provides the presence of an Accused as a requirement during search. Further to that the contention that no leader was present is not correct as Pw6 one Gabriel Laurean who was a Hamlet Chairperson testified that he was present during the search (Page 23).

With regards to the 6th ground appeal, the Appellant argued that the case against him was not proved to the required standard, the contention which the Learned State Attorney vehemently refuted. He clarified that the Victim (Pw2) testified that the Appellant forced his way to her house. When he entered she switched the solar light on and identified him. She went on that the Appellant raped her and stole some of her properties. (page 16 -17). The State Attorney also informed the court that he observed an irregularity on the provision used to charge the Appellant which was quoted as Section 130

(1) (2) (e) and 131 (1) of Cap 16 which concerns rape victims under 18 years. He further went on that the court noted the irregularity and corrected the same to read 130 (1) of Cap 16. He went on that the same was however supposed to read 130 (2) (a) adding that there was no injustice caused for the said irregularity and referred to Section 388 of Cap 20 RE 2002 which provides that despite the error if no injustice has been caused or occasioned to the Appellant the decision stands. He finally prayed the court to dismiss the appeal for lack of merit.

In rejoinder the Appellant has argued that all prosecution witness gave hearsay evidence and further that even the police who arrested him didn't come to court to testify. He went on arguing that on the part of the stolen properties, he wasn't found with anything but it is said that the stolen things were found at Kaijage's house and wondered why Kaijage was not taken to court to answer the charge. The Appellant argued that PW2 had testified that no one came to her rescue during the incidence, yet there are various witnesses who came to testify and wondered where did they came from. He prayed the court to allow his appeal.

The issue to be determined in this argument is whether prosecution has managed to prove its case beyond reasonable doubt, being the standard required in Criminal Cases [Refer the case of **Mohamed Matula vrs R [1995] TLR 3.**

Pw2 who was the victim and the only witnesses who was at the scene of crime testified how the Appellant kicked her door house and entered inside. That when he entered she switched on her solar light and recognized him to be the Appellant, her neighbor. The Appellant raped her for about 4 hours and stole her properties which she mentioned to be her mobile phone, Kitenge, Vikoi (proceedings page 17). Pw6 who was Hamlet chairman (Gabriel Laurean) on hearing the incidence went to Pw2's house and found her door was broken, and straightaway told him that she was raped by Elizeus (Appellant) and that her thing were stolen mentioning them to be Mobile phone, Solar light, Wax piece and blanket (Page 22)

The Appellant was searched and when found; he admitted before Pw1 and one Pascal Protas who testified as Pw2 during the enquiry to have stolen some items which he kept at his brother's house; one Jovin Kaijage (Pw3)

Besides when arrested the Appellant was found in with the mobile phone in his pocket and two solar lights. This witness identified the mobile phone to belong to Pw2 as it has got her name in the battery (page 23). Later this phone was given back to her (Page 18).

It is also on record that, the Police went to conduct search into Kaijage's house where the Appellant has confessed to have kept the stolen properties and the properties he himself mentioned and also mentioned by Pw2, the properties were found. The story of Pw2 being raped and her properties stolen was also testified by Pw3 (Jovin Kaijage). This witness testified that on

10/5/2015 they went to the bar together with the Appellant and left him at the bar after he refused to go back home. He went on that the Appellant returned back around 05:45 the following day ie - 11/5/2015 with bag and covered himself with a blanked. When asked where he has been, he answered he went at a grandma (page 18 - 19). The testimony corroborates the dates of the incidence, the stolen things (blanket and other things which were in the bag).

As for the offence of rape the Doctor who examined Pw2 (Pw4) testified that on examining her private parts he noted that her vagina was not tight as it would have been for an old woman of her age considering that she had no husband and that she had no intercourse for about 25 years. Besides she had bruises in her private parts and thighs the facts which proved that Pw2 was raped (page 20). Looking at the testimonies of the witness, they not only prove that the offences were committed but further that it was the Appellant who committed them.

Regarding his argument that why Kaijage who was found with the stolen properties at his house was not charged, suffice to say that the evidence proved that the stolen properties were taken there by the Appellant without the knowledge of Kaijage that they were stolen.

As the argument that Pw2 testified that nobody came to assist her during the incidence but several witnesses came to testify, it is worthy nothing that all other witnesses save for Pw2 were giving testimonies of what happened

after the incidence and none testified that he was at the place of incidence serve for the victim (Pw2) herself. As such they were corroborating the testimony of Pw2 who was the victim.

The Appellant also asked why the Police who arrested him didn't come to testify - However choice of witnesses is the domain of the prosecution so as to prove its case.

All in all, it's the finding of this case that the court has found the conviction and sentenced of the trial court to be proper and sound. Consequently this appeal is dismissed.

It is so ordered.

R/A Explained.

L.G. Kairo

Judge.

At Bukoba

22/3/2018

Date: 22/3/2018

Coram: Hon. L.G. Kairo, J.

Appellant: Present in person

Respondent: Mr. Uhagile, S/A

B/C: Gosberth Rugaika

Court: The matter is scheduled for Judgment. The same is ready and is read over in open court before the Appellant and Mr. Uhagile the Learned State Attorney for the Respondent.

L.G. Kairo

Judge

22/3/2018