IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 279 OF 2016

(Appeal from the decision of the District Court of Kilombero at Ifakara in Criminal Case No. 109 of 2016 (before T.A.Lyon, RM) dated 30th day of December, 2015)

GODFREY PAULO .....1ST APPELLANT

FRANK WARIOBA.....2ND APPELLANT

NELSON MBWILE.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

13 & 19 Febr. 2018

DYANSOBERA, J.:

The three appellant namely, Godfrey Paulo, Frank Warioba and Nelson Mbwile, hereinafter referred to as the 1st, 2nd and 3rd appellants, in that order, stood trial before the District Court of Kilombero at Ifakara charged with two counts. In the first count, the

appellants were charged jointly and together with armed robbery C/s 287A of the Penal Code [Cap. 16 R.E.2002] in that the appellants, on 9th December, 2015 at about 0030 hrs at Mlimba A within the Kilombero District in Morogoro Region did steal cash Tshs. 70,000/=, two mobile phones, that is Nokia valued at Tshs. 100,000/= and Tecno valued at Tshs. 30,000/=, all total valued at Tshs.200,000/=, properties of Wiston Kikoti and immediately before such stealing they used a piece of iron to beat and assault Wiston Kikoti in order to obtain and retain the said properties.

It is alleged in the second count of unnatural offence that the trio, after committing the offence of armed robbery, they, at about 0040 hrs did have carnal knowledge of Happy Adam against the order of nature.

After the appellants denied the charge, the prosecution called four witnesses to support the allegations. At the end of the trial, they were found guilty, convicted and sentenced to 30 (thirty) years term of imprisonment, each.

Briefly, the facts which unfurled at the trial was the following: Happy Adam (PW 1) and Wiston Kikoti (PW 2) are wife and husband.

On 9th December, 2015 the duo was on the way back home from TAZARA Railway Station. At around 1 pm they saw three people who they knew their faces and identified them by the lights on the road. These people were in hot argument. PW 1 and PW 2 passed them. They then invaded PW 1 and PW 2. The 1st and 2nd appellants grabbed PW 1 and the 1st appellant hit PW 2 with a piece of iron bar on her head and made away with the properties the spouse had in their possession. Th70,000/=, tomatoes valued at Tshs. 1000/= and half cakes valued at Tshs. 3,000/=. They then took PW 1 to a dark place, undressed her and carnally knew her against the order of nature. While at the same time attacking her with a knife on the hands, neck and legs. Each ejaculated twice and after they had quenched their thirst, they ordered her to suck their male organs. She protested but they punched and kicked her. They then ordered her not to tell anybody lest they kill her. She shouted for help but, by the time, PW 2 had lost consciousness. When he regained he went to the neighborhood to ask for assistance. The neighbours converged and found her naked. They took them to the police station, reported and PW 1 and PW 2 were given PF 3's for treatment.

On 11th December, when they returned back the PF 3's at the police station they were told that the appellant had been arrested and managed to identify those people who knew her against the order of nature to be the 1st, 2nd and 3rd appellants. She testified that the 3tf appellant was found with Tecno cell phone which she identified to be her property and the same was admitted in court as Exh. P.3. an iron bar which was allegedly used to assault PW 2 was admitted in evidence as Exh. P. 2.

PW 2's evidence was almost similar to that of PW 1. He, however, qualified it thus. The culprits slapped PW 1 on her face and she fell down. He was also hit with an iron bar twice, fell down unconsciousness. When he regain he found himself with nothing as the thugs had combed everything. He mentioned the stolen items to be a cell phone make Tecno worth Tshs. 50,000/=, cash- Tshs. 70,000/= which was in the wallet, a hand bag valued at Tshs. 15, 000/=, a pair of trousers valued at Tshs. 19,000/=, a bedsheet valued at Tshs. 12,000/=, tomatoes worthy Tshs. 1,000/= and half cakes valued at Tshs. 3,000/=, smearing oil valued at Tshs. 2,000/= and a Nokia phone valued at Tshs.25, 000/=.

At the police, an identification parade was prepared and supervised by S.P. Magnus Mringa was conducted whereby PW 1 identified the 1st, 2nd and 3rd appellants to be the culprit who invaded, robbed them and ravished her. The identification parade register PF 186 was tendered in court and admitted as Exh. P. 4.

The three appellants denied any complicity. They all challenged the identification and the parade allegedly conducted against them.

In his decision, learned trial Resident Magistrate found the evidence of the appellants contradictory and unreliable. He also found that the acts done by the appellants are contrary to the laws of the land and that they were done maliciously and unlawfully. He proceeded to find them guilty and convicted them

PW 3 Dr. Wilson Joseph who admitted not to have been the one who attended PW 1 and PW 2, told the trial court that the victims were admitted to the hospital, treated and then discharged.

The appellants who were not satisfied with the trial court's decision appealed to this court against both conviction and sentence. Their joint petition of appeal has six grounds of appeal

which boil down to one complaint that the charge against them in both counts was not proved beyond reasonable doubt. The reasons advanced touch on the visual identification, identification parade and relying on uncorroborated prosecution evidence.

At the hearing of the appeal, Mr. Katuri, learned State Attorney appeared for the respondent while the three appellants appeared in person and prosecuted the appeal on their own.

Learned State Attorney supported the appeal and his reliance was pegged on two grounds of appeal, that is, the 1st and 3rd ground of appeal. He told this court that the identification of the appellants by PW 1 and PW 2 was by road lights. Learned State Attorney submitted that the extent and intensity of that light, which was an important issue was not explained. Further that no distance was mentioned by these two crucial witnesses. According to him, the culprits were strangers but none gave physical descriptions either to the police or to court. Learned State Attorney relied on the case of **Nestory Cornel @ Rweyemamu v. R**, Crimial Appeal No. 230 of 2014.

On the third ground of appeal, Mr. Katuri said that the witnesses did not identify the Tecno cell phone. He explained that the evidence was silent from whom the cell phone was impounded. Further that even the identification parade had no evidentiary value, learned State Attorney concluded.

I think the appeal has merit. This being a criminal case, the burden of proof is always on the prosecution side to prove their case beyond reasonable doubt which simply means that the prosecution are duty bound to lead strong evidence as to leave no doubt to criminal liability of the accused persons. Did the prosecution discharge this burden in the instant case? The Republic was of the view, and I think rightly so, that the prosecution failed to discharge this burden.

First, as clearly demonstrated by the appellants and conceded by the Republic the identification by the identifying witnesses that is PW 1 and PW 2 was not water tight. The evidence is, therefore, clear that all possibilities of mistaken identity were not eliminated and the evidence before the court was not absolutely watertight. The extent and intensity of the illumination was not explained, the culprits were strangers to PW 1 and PW 2 and there was no

description. In **Philipo Rukaiza @ Kitchwechembogo Vs. Republic,** Criminal Appeal No. 215 of 1994 CAT (unreported) the Court of Appeal of Tanzania observed:-

> *"The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if, in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and every reasonable possibility of error has been dispelled. There could be a mistake in the identification notwithstanding the honest belief of an otherwise truthful identifying witness.".*

Second, as correctly pointed out by the appellants and supported by learned State Attorney the identification parade had no evidentiary value. The court in the case of **Ezekiel s/o Peter v. R.** (1972) HCD 165 detailed the methods of identification which should be followed and held thus: "If an identification parade is to be

of any value at all in identifying the perpetrator of a crime under investigation, it is necessary for a detailed description of the method followed in conducting the parade, the names of the officer/officers conducting the parade and the names of the identifying witnesses to be given in evidence. The method of identification that should be followed is as set out in the case of **Rex v. Mwango s/o Manaa** (1963) E.A.C.A. 29. Instructions for identification parades: (1) that the accused person is always informed that he may have a solicitor or friend present when the parade takes place. (2) That the officer in charge of the case, although he may be present, does not carry out the identification (3) That the accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or allowed to take any position he chooses, and that he is allowed to change his position after each identifying witness has left, if he so desires. (6) Care to be exercised that the witnesses are not allowed to communicate with each other after they have been to the parade. (7) Exclude every person who has no business there (8) Make a careful note after each witness leaves the parade, recording whether the witness identifies or other circumstance. (9) If the witness desires to see the accused walk, hear him speak, see him with his hat on or off, see this that is done. As a precautionary measure it is suggested the whole parade be asked to do

this. (10) See that the witness touches the person he identifies. (11) At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply. (12) In introducing the witness tell him that he will see a group of people who may or may not contain the suspected person. Don't say, "pick out somebody" or influence him in any way whatever. (13) Act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably". The whole of confirming strictly to the rules on identification is to remove any chance of error. It is in short a precaution against error.

In the instant case, I am far from being satisfied that PW 4 adhered to these guidelines.

Third, the appellants, it seems, were convicted not on the strength of the prosecution case but on the weakness of the defence. The trial court's observation that *the evidence of the appellants was contradictory and unreliable, that the acts done by the appellants are contrary to the laws of the land and that they were done maliciously and unlawfully* without assessing and evaluating the prosecution evidence is a clear indication that the trial court shifted the burden of proof from the prosecution to the appellants, a fact which was legally wrong.

Fourth, it is not clear on which counts the appellants were convicted; they having been charged with two counts of armed robbery and unnatural carnal knowledge.

In the event and for those reasons, the appeal succeeds and is allowed, convictions are quashed and the sentences set aside. It is ordered that unless the appellants are lawfully held for other causes, they should be set free forthwith from custody.

W.P.Dyansobera

JUDGE

19.2.2018

Judgment has been delivered at Dar es Salaam this 19th day of February, 2018 in the presence of the appellants and Ms Clara Chawe, learned senior state attorney for the respondent.

W.P.Dyansobera

JUDGE