IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 363 of 2018

(Original case: Criminal Case No 63 of 2017 in the District Court of Kinondoni)

IBRAHIM RASHID SENERA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MASABO, J.:-

Ibrahim Rashid Senera, the appellant in this case was charged of committing an unnatural offence contrary to section 154(1) (a) and (2) of the Penal Code Cap 16 RE 2002. It was alleged during trial that on 20/8/2016 at Kigogo area within Kinondoni district in Dar es Salaam the appellant and 3 other persons (not apprehended) robed one Warda Ramadhan (a girl of 15 years) and Sara Shedrack (a girl of 16 years) and dragged them into a nearby house where they had canal knowledge of both of them against the order of nature. After full trial the court found him guilty and convicted him and subsequently sentenced him to 30 years imprisonment. Dissatisfied he lodged this appeal on 11 grounds which can be summarized as follows:

1. That the trial court erred in law and fact by relying on visual identification of the Appellant by PW1 and PW2 which was poor and unreliable;

2. The trial court erred in law and fact in relying of the testimony of PW1 and PW2 which was taken in total disregard of the requirement for a viore dire test
3. That the trial court erred in in law and fact by believing that PW1 and PW2 were 15 and 16 years respectively while there were no birth certificates to prove the same
4. The trial court erred in law and fact by relying on Exhibit P1 (PF3) because it denied the appellant an opportunity to have a DNA test of his spermatozoa so as to conclusively establish that he real committed the offence charged
5. That the court erred in relying on Exhibit P2 (Caution statement) which was admitted un-procedurally as it was not read over to the appellant
6. That the court erred in law by relying on Exhibit 3 without conducting an inquiry to determine its correctness as the appellant retracted it
7. That the trial court erred in ignoring the testimony rendered by the appellant in his defence which casted a doubt on the prosecution case
8. The trial court erred in holding that the prosecution proved its case beyond reasonable doubt.

When the appeal was called for hearing the appellant who appeared unrepresented did not make any submission. He just requested this court to find merit in his appeal and discharge him so that he can join his family. On her party, Ms. Christine Joas Learned state Attorney who appeared for the

Respondent Republic supported the appeal on the ground that the appellants conviction was to a large extent based on visual identification of PW1 and PW2 which was very poor in that the victims did not know the appellant and that there was no identification parade. Also, it is not clear on record as to how he was arrested. She added further that in their testimony PW1 and PW2 said the appellant's name was Mabula but his name is Ibrahim Rashid Senera and there was no evidence that he is also known by the name of Mabula.

Before I proceed further, let me first commence by restating the rules guiding visual identification which has been a constant subject in numerous decisions including the decision of the Court of Appeal of Tanzania in the case of **Mussa Hassan Barie & Albert Peter @ John** v R, Criminal Appeal No 292 of 2011 CAT at Arusha (unreported) which I have found to be very much illuminating as it deals with this matter at length. In page 7 to 8 his Lordships had this to say:

> "The law on visual identification is, we think, now fairly settled. It is of the weakest kind, especially if the conditions of identification are unfavourable. So, no court should base a conviction on such evidence unless, the evidence is absolutely watertight. (See **WAZIRI AMANI vs R** (*supra*).
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> Although, no hard and fast rules can be laid down as to what constitute favourable conditions (as those would vary according to the circumstance of each case) factors such as whether or not it was day time or at night if at night, the type and intensity of light; the closeness of the

encounter at the scene of crime; whether there were any obstructions to clear vision, whether or not the suspect(s) were known to the identifier previously; the time taken in the whole incident; and many others, have always featured in considering whether or not identification of suspects is favourable (See **WAZIRI AMANI vs R** (*supra*)

But it has also been developed that in matters of identification favourable conditions alone are not enough. The credibility of witnesses is also important (See **JARIBU ABDALLAH vs R** Criminal Appeal No. 220 of 1994 (unreported).

It has equally been held consistently that in order to enhance his or her credibility, a witness of identification would be expected to give a description of the suspect, in relation to physique, attire etc, and if he knows him, to name him at the earliest opportunity (See **MOHAMED ALLUIvs R** (1942) 9 EACA 72, **MARWA WANGITI MWITA AND ANOTHER vs R** Criminal Appeal No. 6 of 1985 (unreported).

In the instant case, it is vivid from the records, as correctly submitted by the learned State Attorney, that the only evidence linking the appellant to the offence was visual identification by PW1 and PW2 who identified the appellant on the doc as being among the 4 persons who robbed them and had them carnally known against the order of nature. While entering his conviction, the trial magistrate stated that, the accused person was properly identified by both victims in that although they both identified the name of the appellant as Mabula which was not his true name they described his

physical appearance as 'not tall nor short." Also he held that the offence was committed in broad day light (at 13hrs).

Having scrutinized all the testimony adduced in court, I have noted that it is not in dispute that the offence was committed in broad day light. Although there is no description as to the condition of the room in which the offence was committed ie whether there was light or not, there is enough testimony on record from which it can be safely inferred that the condition was favourable enough for the victim to identify the appellant. First, the victims were robbed when they were on the way to the tailor where their sister had sent them which implies that they could see their assailants as it was outside and during broad day time. Also, although the record is silent on whether there was light in the room or not, it is on record that while in the room (scene) the victims were able to see blood stains on the wall. They also managed to read the words which were written on the wall "ukiingia humu hutoki bila ya kutombwa au kufirwa" which suggested that there was enough light. Their testimony of what they saw and read on the wall corroborated with that of PW4 Hassan Salehe Njunde a ten cell leader who testified that upon entering the room he saw blood stains on the wall and that the words written on the wall "HATOKI MTU HUMU NDANI MPAKA AMETOMBWA" which in my opinion were more or less similar to the words described by the victims which would suggest that indeed there was enough light such that PW1 and PW2 could even read the words on the wall.

Not only that but also the time which the appellant spent with PW1 and PW2 was long enough for them to identify him. The testimony of the PW1 and PW2 is to the effect that they were robbed at 13hours and by the time they were released and went home it was about 18 hours hence the whole incidence took approximately 4 to 5 hours which in my opinion was long enough for the victims to recognize their assailants.

The fact that PW1 and PW2 identified the appelants by the name of Mabula and not his real name, is to me devoid of merit as it would be cynical to imagine that the assailants would have used their real names in the cause of commission of the offence. Besides, the ability of the witness to name the offender although reassuring is not a decisive factor. What is however troubling me is the general description of the appellant by PW1 and PW2. Considering as I have already alluded to, that the incidence happened in broad day light, the condition in the room was favourable and the victims spent long time with assailants, one would have expected them to give a more nuanced description. In my opinion, the description of "neither tall nor short" is too general and inacapable of inculpating the appellant.

Regarding the identification parade, the position of the law is that an identification parade is by itself not substantive evidence (**Mussa Hassan Barie & Albert Peter @ John v R** (supra). It only role is to corroborate dock identification of an accused by a witness (See **MOSES DEO vs R** (1987) TLR. 134.

The other ground advanced by the State Attorney in support of the appeal is that, it is not clear from the record as to how the appellant was arrested. Having scrutinized the record further, I have noted that the point raised by the State Attorney is indeed valid. The record is silent on this issue. None of the prosecution witness described how the appellant was arrested in connection to the offence charged. The testimony of PW6 WP 4148 D/CLP Eva and PW7 E/8664 D/CPL Alex did not show the appellant found himself at Magomeni Police Station. Their testimony is to the effect that at different times on 21/8/2016 they were instructed by their superior to interrogate the appellant who was by then already in custody. They did not tell the court when and how the appellant was arrested. The record is also silent on the three persons with whom the appellant committed the offence. On his part, the appellant testified that he was arrested on 10/1/2017 in connection with selling things which did not belong to him (hand written proceedings) although he brought no witness to support his assertion. However, although this could be seen as a mere exculpatory tactic, the circumstances of this case when considered in totality dictates that the issue of apprehension is not a remote one. Considering that the appellant was neither known nor arrested at the scene, it was important for the prosecution to lead evidence on how he was arrested so as to avoid any chances of mistaken identity.

This being a criminal case, the burden of proof lies on the prosecution side and standard of proof is proof beyond reasonable doubt. This burden never shifts (Section 3(2)(a) of the Evidence Act, Cap 6, R.E. 2002; **Boniface Siwinga V Republic,** Criminal Appeal No. 421 of 2007 CAT (unreported).

In totality of what I have demonstrated above, I am of the view that the prosecution case had lingering doubts which in my opinion should be resolved in favour of the appellant.

Accordingly, I allow the appeal, quash the conviction and set aside the sentence. The Appellant is to be discharged with immediate effect unless he is otherwise held for a lawful cause.

DATED at DAR ES SALAAM this 23rd day of October 2019.

J.L. MASABO

JUDGE

Judgment delivered this 23rd day of October 2019 in the presence of Ms. Christine Joas learned State Attorney for the Republic and the Appellant present in person

J.L. MASABO

JUDGE