IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CRIMINAL APPEAL NO. 176 OF 2018

(Arising from Judgment of the District Court of Nyamagana at Mwanza in Criminal Case No.70 of 2017)

1. DANIEL NICHOLAUS MWAKYUSA @ DANY

2. MAGEMBE JOHN KIBOLE } **..... APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Last Order: 20.07.2020

Judgment Date: 24.07.2020

A.Z.MGEYEKWA, J

The appellants were arraigned by the District Court of Nyamagana and stand charged with gang rape contrary to Section 130 (1) and (2) (e) and 131 A (1) of the Penal Code Cap.16 [2019].

Having, accepted the prosecution's version to be true the trial court convicted the appellants on the 2nd count, they were sentenced 30 years imprisonment. Undaunted, the appellants have preferred this appeal. In the petition of appeal, he has raised six grounds of the complaint as follows:-

1. *That, the screamed victim did never describe/name the already known suspected appellant before PW2 one Nassoro Rajabu and his fellow; prior before they met together on the road, thus render identification assertion be an after though made in the dock.*

2. *That, regarding the appellant's pre and post conduct toward commotion of the claimed offense, the evidence by PW1, PW2 and PW3 differ in material facts thus unsafe to be relied on.*

3. *That, it was unsafe to rely upon the purported confession statements exhibit P2 and P3 which was improperly and involuntarily extracted by a single police officer/investigator*

4. *That, the appellant's conviction was improperly mounted under the basis of identification/recognition assertions which was not watertight for wanting of elementary facts.*

5. *That, the presiding court erred on relying the prosecution case which was not corroborated, worse enough its evidence was not reliable at all.*

6. *That, the presiding court erred in shift the burden of proof of the charge to the appellant whereas the prosecution case was too dubious.*

When the matter was called for hearing, the appellants were remotely present while the respondent had a service of Mr. Ndamgoba, learned Principal State Attorney who was also remotely present.

The first appellant and 2nd appellant had no much to say they urged this court to adopt the grounds of appeal and set them free since they claimed that they did not commit the offense of rape.

On his part, Mr. Ndamgoba supported the conviction and sentence. On the 1st and fourth ground of appeal, he argued that the appellant complained that the identification was weak while PW1 testified to the effect that he identified the accused and mentioned the accused at the earliest opportunity. Mr.Ndamgoba argued that PW2 is the one who heard an alarm and he was at the scene of the crime and

he stated that there was enough light and claimed that the accused uttered bad words. He went on to argue that the description of the accused was clear because he knew them and they were under observation for some time. He added that prosecution evidence was credible.

Submitting on the second ground of appeal, Mr. Ndamgoba argued that the accused wants to challenge the credibility of the PW1, PW2, and PW3. He argued their evidence were similar and credible.

In respect to the 3rd ground of appeal, Mr. Ndamgoba admitted that the confession statement was improperly admitted because it was taken out of time. He added that apart from the confession statement the remaining evidence on record suffices to ground conviction upon the appellants.

Arguing for the 5th ground of appeal, Mr. Ndamgoba argued that PW1 evidence is corroborated by PW2 and PW3 evidence. He added that PW2 found the action on motion thus his evidence was clear and reliable.

On the last ground of appeal, Mr. Ndamgoba stated that the prosecution proved the case beyond reasonable doubt and the same render conviction upon the appellants.

In conclusion, the learned Principal State Attorney urged this court to dismiss the appeal.

In their rejoinder, the appellants maintained their submissions in chief.

After careful perusal of the record of the case, the testimonies adduced by the appellants and Mr. Ndamugoba learned Principal State Attorney. I should state at the outset that in the course of determining this case, I will be guided by the canon of the criminal cases which places on the shoulders of the prosecution, the burden of proving the guilt of the appellant beyond all reasonable doubt. The question, in this case, will be *"whether the evidence adduced by the prosecution was strong enough to ground a conviction for the offense of rape".*

In considering the first and fourth grounds of appeal which relates to the identification. In this case at hand, the victim (PW1)

narrated that she was heading to a shop it was around 20:00 hours and she was all alone. She testified that Daniel Nicholaus (1st appellant) and Magembe John (2nd appellant) and one Geoffrey approached her and raped her. PW1 further testified that at the scene of the incident there was electricity lit from a nearby house. In my view, although PW1 and PW2 have testified to the effect that they identified the rapist but they did not mention the intensity of electricity light taking to account that the alleged incident occurred at night 8:00 hours. Saying that the place was a business place and there was electricity light by itself is not enough.

PW2 said that he heard one was shouting for help '*Naomba mnisaidie nabakwa*, he moved closer to the scene of the crime and saw the girl from inside she was holding a *khanga*, underwear, and file. PW2 testified that at the scene of the incident there was electricity light thus they took PW1 to the nearby house with electricity and asked her what happened. The record reveals that PW2 did not mention the intensity of the electric light, I am worried if he identified the appellant because PW2 testified to the effect that they took PW1 to the house with electricity that means the light at the scene of the incident was

not bright enough to enable PW2 to see what happened. In my view, accordingly, to PW2 evidence, he did not witness when PW1 was raped.

I am mindful of the fact that the best evidence is that coming from the victim herself. However, it depends on the circumstances of the case. It is trite law and the Court of Appeal of Tanzania in many instances stated the legal principle regarding evidence of visual identification. These include; one, such evidence is of the weakest kind and utmost unreliable and should be acted upon cautiously after the court is satisfied that the evidence is watertight, and all possibilities of mistake identify are eliminated. Two, even if it is evidence of recognition that evidence must be watertight, in regard, where the offense is committed at night, and the question of light is in issue, there must be clear evidence as to the intensity of light of the said light and that bare assertions would not do.

Three, in matters of identification, condition for identification alone, however ideal they may appear are no guarantee for untruthful evidence. As it was held in the case of **Magwisha Mzee and Another**

v R, Criminal Appeal No. 465 and 467 of 2007, **Daniel S/O Paul @ Meja v R**, Criminal Appeal No. 307 of 2016 (all unreported). In the case of **Hamis Hussein v R**, Criminal Appeal No. 86 of 2009 held that:-

> " *We wish to stress that even in recognition cases when such evidence may be more reliable than the identification of a stranger, the evidence on the source of light and its* ***intensity is of paramount importance, This is because as occasionally held even when the witness is purporting to recognize someone he knows, as was the case here, a mistake in recognition of the close relative and friends are often made****." [Emphasize added].*

Guided by the above authorities, means there was a possibility of mistaken identity, taking into account that the incident occurred at night. In the case of **Riziki Method Myumbo v R 2007,** the first appellate judge held that:-

> *"Visual identification is a class of evidence that is vulnerable to mistake, particularly in the conditions of darkness. Courts must, as a rule of prudence, exercise caution in relying on such evidence. It may result in a substantial miscarriage of justice."*

Based on the above authority, it is possible to confuse a person whom you know with another person especially when the prosecution witnesses did not elaborate on the intensity of light at the scene of the incident. And when PW2 was certain that the 2nd appellant is Georfey while he was not. PW2 testified that Geoffrey was present in court while he was not and he further testified that Magembe, the 2nd accused is the one who runs away and was not found while it was not true.

In my view, PW2 evidence is doubtful whether he was able to identify well the accused persons. I am saying so because he mistakenly identified the 2nd accused, therefore, most likely he did not identify the 1st accused as well. Stating that he knew them because they resided in the same street is not a conventional reason for correct identification.

I have carefully considered the circumstances surrounding the identification of the appellants by PW1 and I have found that the identity of the appellants is shakable and doubtful and the evidence

was not watertight to convict the appellants. Although PW1 said that she knew the appellants and named them but the condition was not conducive for correct identification, it cannot be said that she positively recognized the appellants to be her rapist. Therefore the 1st and 4th grounds of appeal are answered in affirmative.

Concerning the 2nd and 5th grounds of appeal which related to material facts of the case are unsafe because the prosecution evidence was unreliable, I had to peruse the court records and found that PW1 testified that he was raped by the 1st appellant, 2nd appellant, and one Geoffrey. However, PW2 testified to the effect that PW1 told him that he was raped by the 1st appellant and one Geoffrey he did not mention the 2nd appellant.

Additionally, PW3 in her testimony stated that PW1 named the rapist were Daniel, Geoffrey, and Gamber this is stated on page 22 of the trial court typed proceedings. Thus, the records are in favor of the 2nd appellant.

Another shortfall is in relation to penetration. It is trite law that for the "offense of rape *"...there must be unshakeable evidence of penetration"*. In the case of **Selemani Makumba v R** Criminal Appeal No. 94 of 1999 (unreported) the Court of Appeal of Tanzania considered whether or not the complainant had been raped by the appellant and observed: -

> *" True evidence of rape has to come from the victim, of an adult, that there were penetration and no consent, and in the case of any other woman where consent is irrelevant, that there was penetration..."*

In the instant appeal, PW1 evidence regarding the first accused proved that she was penetrated with a blatant object. However, she did not prove if there was penetrated with a blatant object concerning the 2nd appellant. PW1 did not prove if the 2nd appellant inserted his penis in her vagina I am saying so because PW1 testified that the 2nd appellant raped her but that saying was not enough to prove if there was any penetration, she was required to explain clearly how penetration took place. In the case of **Kayoka Charles v R** Criminal Appeal No. 325 of 2007, the Court of Appeal held that penetration is a

key aspect and the victim must say in her evidence that there was a penetration of the male sexual organ in her sexual organ. It was the duty of the prosecution to prove beyond a reasonable doubt that the accused persons took part in an act of sexual penetration with the victim.

Under section 130 (4) of the Penal Code Cap. 16 [R.E 2019], all that is important in rape cases is the proof of penetration, however slight, be established and that it is not necessary to prove resistance or injury to the body. The Police Officer tendered underwear in court but the same does not prove that PW1 was raped. Section 130 (4) state that:-

" 130 (4) to prove the offense of rape -

(a) penetration however slight is sufficient to constitute the sexual intercourse necessary to the offense; and

(b) evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent".

Since in the present case PW1 categorically explained that the 1st appellant inserted his male organ in her female organ that was

sufficient. However, there was a possibility of mistakenly identifying the 1st appellant because PW1 failed to explain the intensity of light at the scene of the incident.

Another ailment is when the prosecution failed to tender a PF3 in court. PW3 testified to the effect that a PF3 was prepared but the same was not tendered in court and neither was it not proved by the Doctor if there was any penetration because PW1 was not examined by Doctor.

The 3rd ground of appeal which relates to the cautioned statement as rightly stated by the prosecution side that the same was recorded out of time, therefore, it is not a fit document to rely upon, this ground is answered in affirmative.

With the foregoing observation, it is correct to say that the prosecution failed to prove its case beyond reasonable doubt as stated under the 6th ground of the appeal. Failure to prove the case beyond reasonable doubt suffices to hold that the trial court's conviction against the appellant was not proved beyond reasonable doubt and occasioned to failure of justice on the part of the appellants.

Under the circumstances, I allow the appeal. I quash the conviction and set aside the sentence. I order the immediate release of both appellants from prison unless they are lawfully held for other lawful purposes.

Order accordingly.

Dated at Mwanza this date 24th day of July 2020.

A.Z.MGEYEKWA

JUDGE

24.07.2020

Judgment delivered on 24th day of July, 2020 via audio teleconference and both parties were remotely present.

THE HIGH COURT OF TANZANIA MWANZA

A.Z.MGEYEKWA

JUDGE

24.07.2020

The right to appeal fully explained.