IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]
AT ARUSHA

CRIMINAL APPEAL NO. 58 OF 2019
(Originating from the District Court of Simanjiro Criminal case No.37 of 2017 L. R. Kasebele, SRM)

ISAYA LOSERIAN ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 27/02/2020
Date of Judgment: 27/03/2020

MASARA, J.

1.0 Introduction

In the District Court of Simanjiro at Orkesumet, Isaya Loserian, the Appellant, stood charged with two counts; namely, Rape, Contrary to Sections 130 and 131 of the Penal Code, Cap. 16 [R. E. 2002], and Unnatural Offence, Contrary to Section 154(1)(a) of the Penal Code, Cap. 16 [R.E. 2002]. He was found guilty and convicted of the two counts. Consequently, he was sentenced to thirty (30) years imprisonment in jail for each count, sentences to run concurrently. Aggrieved, the Appellant has preferred this appeal to this court challenging both conviction and sentence on six grounds as reproduced verbatim:

a) *That, the trial court erred in law and fact in convicting the appellant while the charge sheet preferred against him was defective;*
b) *That, the trial court erred in both law and fact in convicting the appellant while the evidence on identification was not water tight to mount a conviction;*
c) *The trial court failed to evaluate properly the evidence tendered before it which was full of doubts;*
d) *That, the trial magistrate was unable to properly frame the issues;*
e) *That, the trial court erred in law and fact by failing to consider the appellant's defence; and*
f) *That, the trial court erred in law and fact when it failed to scrutinize and evaluate the evidence of PW3 and exhibit P1 as a result it arrived at a wrong verdict.*

The Appellant appeared in person, unrepresented; while the Respondent was represented by Mr. Mweteni Azael, learned State Attorney. A number of issues arise from the grounds above stated; namely: whether the charge against the Appellant was defective; whether the trial Magistrate failed to frame issues; whether the evidence of identification was watertight and whether the case against the Appellant was proved beyond reasonable doubts. Before tackling these issues, it befits that facts leading to this appeal are outlined, albeit in brief.

2.0 Background

At the trial, it was the prosecution case that on the 1st day of March, 2017, at 03:00hrs the Appellant went to PW1's house pretending to be PW1's son and asked her to open the door. PW1 knowing it was her son, Saitoti, opened the door. The Appellant thereof attacked her, raped her and as if that was not enough, he sodomised her to the extent that faeces came out of her anus uncontrollably. While doing all that, the Appellant is said to

have threatened to kill PW1 in case she cried out for help. PW1 hesitantly adhered to the order. When the Appellant was done with his lust business, he forced her to give him food. PW1 gave him food (a plate of makande) and the Appellant disappeared with the food. PW1 went to Saitoti's house (PW2, her son) at around 10pm and explained to him what had happened to her. PW2 took PW1 back to her house where they found faeces. The next day they arrested the Appellant while doing casual works. They took him to PW1's place and then to the village executive officer (PW3). The accused admitted before him that he had sex with PW1 by consent. PW3 issued them a letter and then they took the Appellant to the Mirerani Police Station. The testimony of PW4, the investigator of the case, is that she took the Appellant's cautioned statement and that the Appellant admitted to have sexual intercourse with PW1 but denied the allegations that he sodomized her. PW1 was taken to Mirerani Health Centre for medical examination. PW5 a Clinical Officer from Mirerani Health Centre admitted to have examined PW1 on 2nd day of 2017. Upon examining her, he found some sperms and she also sustained bruises in her vagina and faeces were released out of control from her anus.

On his defence the Appellant denied to have committed the offence he was charged of. He stated that he did not go to PW1's house as alleged. He contended that the charge against him was a mere fabrication because he is not in good terms with PW1's son (PW2) who accused the Appellant for participating in selling his farm. He added that he knows PW1 to be drunkard woman and that she killed her husband and stayed in prison for six years where the Appellant was called as a witness and testified. At

some point when she was released from prison, she told the Appellant that she would do something bad to him since he testified against her.

3.0 Was the charge against the Appellant defective?

Submitting on his first ground of appeal the Appellant stated that the charge against him was defective as it did not specify the specific subsections and clauses of Section 130 of the Penal Code that he had contravened. The charge also did not also refer to which subsection of section 131 of the Penal Code. The Appellant therefore argued that he was prejudiced as he could not prepare his defence. Mr. Azaeli conceded that on the first count the charge does not specify on which subsection the Appellant was charged of. However, he argued that on the second count, the charge was properly drafted. He therefore asked the Court to confirm the second count as having been properly drafted.

I agree with submission made by the Appellant and conceded to by the learned State Attorney. For avoidance of doubt, the charge against the Appellant on the first count is reproduced:

> ***"CHARGE***
> ***1ST COUNT***
> ***STATEMENT OF OFFENCE***
> ***RAPE:*** *Contrary to section 130 and 131 of the penal code Cap 16 Revised Edition 2002.*
> ***PARTICULARS OF OFFENCE***
> ***ISAYA*** *s/o* ***LOSERIAN*** *charged on the 1st day of March 2017 during night time at* ***Olbil*** *Village within Simanjiro District in Manyara Region unlawfully did have sexual intercourse with one* ***MARTHA*** *D/O* ***ELIAU*** *without her consent..."*

As noted above, it is not disputed that the charge on the first count is defective for generalizing the offence. It only mentioned section 130 without specifying the subsection of which the Appellant was accused of. The charge shows that the Appellant was charged with rape contrary to section 130 and 131 of the Penal Code. That renders the charge defective as per section 135 of the Criminal Procedure Act; Cap. 20 R.E 2002. The Court of Appeal in the case of ***Marekano Ramadhani Vs. R,*** Criminal Appeal No. 202 of 2013 (Unreported) while citing the cases of ***Charles s/o Makapi Vs. R,*** Criminal Appeal No. 85 of 2012 and ***Simba Nyangura Vs. R;*** Criminal Appeal No. 144 of 2008 (both Unreported) had the following to say regarding similar defects in the charge:

> *"...this lack of particulars unduly prejudiced the appellant in his defence..."*
> *Framing of charges should not be taken lightly. We think it is imperative for the prosecution to carefully frame up a charge in accordance with the law. It becomes even more vital to do so where an accused is faced with a grave offence attracting a long prison sentence as it was the case in this matter. When you look at the circumstances of the case, it appears that the appellant who is a lay person and who had no legal representation believed that the complainant was of the age for marriage. It was important therefore that from the word go he should have been informed and properly made aware that he was being charged with statutory rape so that he could adequately address the charge laid against him."*

In all of the above cited cases, the Court of Appeal was of the view that non-citation of the proper provision of the law in drawing up a charge goes to the root of the matter. It is not a curable defect under Section 388 of the CPA. As rightly submitted by the Appellant the defect prejudiced him from preparing his defence. This is in regard to the first count of the

charge. The consequences of defects in the charge are well articulated in numerous decisions of the Court of Appeal. In the case of ***Jackson Venant Vs. Republic***, Criminal Appeal No. 118 of 2018 (Unreported), the Court of Appeal, while discussing consequences of a defective charge, had this to say:

> *"We need to emphasize that this Court has also held in many other cases depending on the circumstance like this one,* ***that the defects in the charge are incurable under section 388 of the CPA.*** *We wish to refer to the recent decision of this Court in* ***Joseph Paul @ Miweia v. The Republic,*** *Criminal Appeal No. 379 of 2016 at Iringa (unreported) in which a number of other decisions of the Court on similar position was referred to support the holding of the Court."* (Emphasis added)

From the decision cited above, defects in a charge cannot be cured under the omnibus section 388 of the Criminal Procedure Act. Such defects render a trial a nullity. The Court of Appeal in ***Alex Medard Vs. R***, Criminal Appeal No. 571 of 2017 (Unreported) had this to say:

> *"As to whether the defective charge could be salvaged, we do not agree with Ms. Maswi's stance that the defect can be cured under section 388 of the CPA. To the contrary, we think, as was argued by Mr. Kabunga,* ***it cannot be cured as the appellant did not receive a fair trial.*** *This position was stated in a number of cases decided by this Court. Just to mention a few, they include Isdori Patrice v. Republic, Criminal Appeal No. 224 of 2007; Khatibu Khanga v. Republic, Criminal No. 290 of 2008; Joseph Paul @ Miwela v. Republic, Criminal Appeal No. 379 of 2016; Maulid Ally Hassan v. Republic, Criminal Appeal No. 439 of 2015 (all unreported); and Mussa Mwaikunda v Republic, [2006] TLR 387."*

I do hold that as far as the first count of the charge is concerned, the charge was defective. Consequently, the Appellant did not receive a fair

trial with on the first count. His conviction and sentence on that count cannot be sustained. The same is not the case with the second count. The second count has no defect as it was well drafted. Therefore, the first ground of appeal has merit as far as the first count is concerned. I will now proceed to determine the appeal on the second count of the charge only.

4.0 Did the Trial Magistrate frame issues for determination?

The fourth ground of appeal is to the effect that no issues for determination were raised by the trial Magistrate. That, if proven, will be contravening the express provisions of Section 312(1) of the Criminal Procedure Act. The same provides:

> *"Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and* ***shall contain the point or points for determination, the decision thereon and the reasons for the decision,*** *and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court."* (Emphasis added)

Mr. Mweteni, while submitting on this ground informed the Court that the accusation was not true as the Court drafted one issue for determination. Reference was made to page two fourth paragraph of the typed judgment. He is right. From the record of the trial court the court framed one issue for determination. For the purpose of clarity, I reproduce it in verbatim;

> *"In short, the above is the total evidence in this case.* ***Court raised one issue, which is whether the case the accused charged with was proved beyond reasonable doubt****".* [Emphasis is mine]

Therefore, the allegation by the appellant that there were no issues for determination is unfounded. The fourth ground therefore fails.

5.0 Was the Appellant properly identified at the scene of crime?

The Appellant faults his identification by PW1 arguing that the source of light (taa ya koroboi) which was said to have been used in identifying the him was insufficient. He stated that the said light was dim, so it could not be sufficient to enable proper identification of the assailant. The learned State Attorney countered this ground by arguing that the evidence of PW1 is clear that they spent considerable time together and that they knew each other before. This to him suffices to avert any issue of mistaken identification. Mr. Mweteni made reference to the case of ***Waziri Amani Vs. R*** [1980] TLR 250 and concluded that the appellant was properly identified.

I should state that the law on visual identification was clearly stated by the Court of Appeal in the celebrated case of ***Waziri Amani Vs. R*** *(supra).* The case set out guidelines on visual identification which the courts in this jurisdiction have uninterruptedly followed. It was held:

> *"... evidence of visual identification as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that 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...*
> *Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, 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 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. The 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. These matters are but a few of the matters to which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity."

The above exposition lay down principles in respect of visual identification during the night, in broad daylight and visual identification by recognition. The principles have been followed in a number of cases. See ***Juma Marwa and 2 Others Vs. R;*** Criminal Appeal No. 91 of 2006, ***Yohana Kulwa@Mwigulu and 3 Others Vs. R;*** Consolidated Appeals No. 192 of 2015 and 397 of 2016, ***Horombo Elikaria Vs. R;*** Criminal Appeal No.50 of 2013, and ***Samwel Dickson & Another Vs. R,*** Criminal Appeal No. 32 of 2014 (All Unreported).

In the instant case, the offence was committed during the night and the visual identifier knew the Appellant before. From the evidence on record, PW1, PW2 and PW3 claim to know the Appellant even before the commitment of the offence. PW1 mentioned the Appellant's work place which is Kwa Hassan Mbulu. She further stated that, the Appellant passes at her home daily while going to his work.

She narrated that on the fateful day she had chance to stay with him after the incident as the Appellant demanded for food which she gave, and that there was some kind of conversation when the Appellant was warning her not to shout. Regarding the source of light, PW1 pointed out that she had lighted 'koroboi' which facilitated her to identify the Appellant. She added further that while outside, she managed to identify the Appellant through a full bright moon. In his defence, the appellant admitted that he knew PW1 and her son PW2. Considering the time they spent together, also the fact that PW1 knew the appellant before and also the fact that soon after the incident had occurred PW1 went to PW2 and mentioned the Appellant as the person who raped and sodomized her, I am convinced that the identification of the Appellant was proper. There is no doubt that the parameters established in ***Waziri Amani*** (Supra) were met. I have no doubts that the evidence on the identification of the Appellant was water tight.

6.0 Was the case against the Appellant proved beyond reasonable doubts?

The third, fifth and sixth grounds of appeal form the basis of the last issue, whether the Prosecution proved the case against the Appellant beyond reasonable doubts. The Appellant, while submitting on the third ground was of the view that exhibit P2 was wrongly admitted since there was no prayer for the same to be admitted as exhibit. On the fifth ground, it was his submissions that the trial Magistrate did not consider his defence and failed to properly evaluate the evidence of all the witnesses and exhibits tendered. Mr. Mweteni opposed these views. He was of the view that the

trial magistrate properly evaluated the evidence before her. On the admission of exhibit P2 the learned State Attorney averred that the exhibit was properly admitted. He cited the case of ***Sulemani Makumba Vs. R*** [2006] TLR 379 submitting that the test on rape cases comes from the victim and PW1 being the victim she testified and her credibility was not in doubt.

I subscribe to the line of argument as submitted by Mr. Azaeli. Under section 127 (7) of the Evidence Act, if a witness is found to be a credible witness, the victim's evidence can alone ground a conviction. See the Court of Appeal case of ***Hussein Hassan Vs. R,*** Criminal Appeal No. 405 0f 2016 (unreported). The evidence in rape and unnatural offence cases is mainly based on the testimony of the victim. If the victim is reliable and his/her credibility is not in question, then such evidence can justify a conviction. Therefore, in view of the fact that the evidence of PW1 was consistent, truthful, credible and strong, I agree with the learned State Attorney that the court was right in convicting the Appellant. In ***Mathias Robert Vs. R,*** Criminal Appeal No. 328 of 2016 (CAT – unreported), which cited with approval the decision in ***Seiemani Makumba Vs. R*** (supra), the Court of Appeal observed:

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

Similar holding can be observed in ***Mkumbo Hamisi Vs. R***, Criminal Appeal No 24 of 2007 and ***Anyelwisye Mwakapake and Another Vs. R***, Criminal Appeal No. 227 of 2011, (both unreported).

From the trial court record, it shows that admission of exhibit P2 (which is the PF3) was done on 14/08/2017. It was tendered by PW5, the Clinical Officer, who examined PW1. For easy reference let me reproduce part of the proceedings which led to the admission of the said exhibit:

> ***"..... PP Mussa;*** *I pray to show the doctor the PF3 he filled*
>
> ***Accused;*** *I have no objection*
> ***Court;*** *Court; prayer granted*
> ***Sgd; L. R. Kasebele SRM***
> ***14/08/2017***
> ***XD Proceeds:*** *This is the PF3 I filled and my names are these ones, also my signature is this one. The names of the victim are these ones Martha Eliao. I am ready this PF3 be admitted by the court as exhibit*
>
> ***PP Mussa:*** *I pray the PF3 be admitted as exhibit*
>
> ***Accused:*** *I object because we were sent to the police station on 3/3/2017 and not the date filled.*
>
> ***PP Mussa:*** *Your honor we do not talk about the date when the accused was sent to court or police station, we are talking about the PF3. I pray the court not to consider what the accused said as it is out of what is in our presence.*
>
> ***Court:*** *what is said by the accused can be part of his defence not the objection. The court admits the PF3 and marked it as exhibit P2.*
> ***Sgd L. R. Kasebele SRM***
> ***14/08/2017"***

From that extract, it is apparent that exhibit P2 was properly admitted. The allegations by the Appellant that there was no prayer for the admission of the same is unfounded. From the record, it seemed that the Appellant objected to the admission of the exhibit but his objection was overruled by

the court on the ground that what the Appellant was objecting is the date when the PF3 was filled in.

The Appellant also alleged that his defence was not considered. I note that at page 2, 3rd paragraph of the typed judgment, the trial Magistrate evaluated the Appellant's evidence. Equally, before convicting the Appellant the trial magistrate made the following observations:

> *"Accused deny committing the offences but he failed to stand for his denial, he spoke about the threat he was given by the victim but did not tell the court whether he reported it."*

The quoted paragraph might sound to be akin to a shift of burden to the Appellant; however, considering the judgment in totality, the same is indicative that the trial court was alive to the defence raised by the Appellant in his evidence. The appellant, in his defence, stated that the charge against him was fabricated as he was not in good terms with PW1 and his son. That is the line of defence that the Court appeared not to agree with as such allegations were not substantiated by the Appellant and were raised at the defence stage.

Furthermore, the Appellant challenged the trial court's judgment on the ground that it failed to scrutinize and evaluate the evidence of PW3 and exhibit P1. The Appellant further argued that the trial court erred in admitting exhibit P1 without scrutinizing the same. The Appellant added that he was beaten and threatened and there was no witness who supported the assertion that the appellant confessed. I do not agree with the Appellant in this regard. The testimony of PW3 is only to the effect that

the Appellant was arrested and he was taken to him as a Justice of the Peace. It is true that this witness informed the Court that the Appellant admitted to have had consensual sex with PW1. PW3 through a letter, Exhibit P1, from the Olbil Village Executive Officer dated 2nd March 2017 referred the Appellant to the Officer In charge of Mirerani Police Station requiring him to receive the him in his station for appropriate actions. Exhibit P1 had nothing to do with the merits of the case against the Appellant. It is nowhere written in the said exhibit that the Appellant admitted to have committed any of the offences. The trial Court Judgment does not also rely on the same in reaching its ultimate decision. No wonder that the learned State Attorney did not agree with the Appellant in this regard. Mr. Mweteni was, nevertheless, quick to point out that even without the confessional statement alleged by PW3, the evidence of PW1 sufficed to prove the charge against the Appellant.

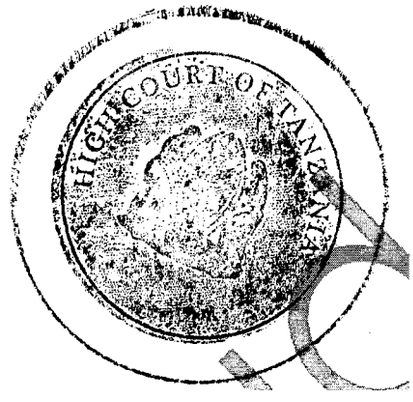
I have gone through the trial court record; I am not convinced at any rate that the conviction of the Appellant was based on exhibit P1. It is also noted that the Appellant did not object its admission. As argued by the learned State Attorney, even without considering exhibit P1, the testimony of PW1 was strong enough to mount a conviction against the Appellant. I am of a considered view that the basis of the Appellant's conviction emanated to great extent from the testimony of PW1 (the victim) as corroborated by the evidence of PW5. Therefore, the fourth, fifth and sixth grounds of appeal are equally devoid of merits.

7.0 Conclusion

Having disposed of all issues emanating from the grounds of appeal, it is decided as follows:

a) the Appellant's conviction on the first count of rape is accordingly quashed and the sentence of thirty years thereof set aside;
b) The Appellant's appeal on the second count is dismissed in its entirety. The conviction thereof and a sentence of thirty (30) years imprisonment met against the Appellant are hereby upheld and confirmed; and
c) Consequently, the appeal is partly allowed to the extent stated herein.

Order accordingly.



Y. B. Masara

JUDGE

27/03/2020