IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 117 OF 2017

(C/f Crimianl case No.4 of 2017 in the District Court of Simanjiro - Orkesmet)

ERNEST JOHANNES ..... 1ST APPELLANT

RAJABU SHABANI ..... 2ND APPELLANT

VERSUS

THE REPUBLIC.....,..... RESPONDENT

JUDGMENT

14/5/2019,25/7/2019

MWENEMPAZI, J

The appellants were changed in the District Court of Simanjiro at Orkesmet with the offence of gang rape C/S 131 A (I) and (2) of the Penal Code Cap 16 RE 2002. It was alleged that on the 13/1/2017 during the night hours at Zingatia area, Shamarai village within Simanjiro District Manyara Region they had sexual intercourse with a girl called Juliana Mohamed aged 17 years old. They pleaded not guilty.

Upon hearing of the case whereby five witness testified, the court convicted the accused persons were found guilty of the offence of gang rape C/S 131 A (I) and (2) of the Penal Code Cap 16 RE 2002 and convicted them as per section 235 of the CPA, Cap 20 R.E. 2002. They were thus sentenced to life imprisonment. They have filed an appeal against conviction and sentence on the following grounds of appeal.

1. That the trial court erred both in law and fact to sentence the appellants for a term of life sentence in jail while they have never been convicted of any offence.
2. That the District Court Magistrate erred both in law and fact for convicting the appellants without taking into account that the evidence given by the prosecution witness was not enough to move the case against the appellant6s beyond reasonable doubt.
3. That the appellants was not informed of his night to cross examine the medical doctor and he was not summoned as witness contrary to section 248 (3) of the CPA
4. That the stained deceased's clothes which were cruel pieces of evidence were not tendered in evidence of the law.
5. That the trial Court grossly erred in law and fact by shifting the burden of proof to the appellants to prove their innocence rather than the Republic to prove the case beyond reasonable doubt.
6. That the trial Court grossly erred in law and fact as both Proceedings and Judgment has no legal basis.

At the hearing the appellants were represented by Mr. Philip Mushi, learned advocate and the Republic was represented by Samwel Meliera

Learned State Attorney. They presented their case by way of written submission. Both parties complied to the order of the Court.

The counsel for the appellant commenced the submission by raising two issues which in his opinion were crucial to resolve the dispute at hand. The same are as follows; One, whether the victim of the offence alleged against the appellants was the victim of gang rape; Second, whether the accused persons have really committed the said offence. The answer to the question can early be discerned by evaluating the evidence. His angle of attack was by looking at the time the offence is said to have been committed and that the only evidence linking the appellants is that of identification of the accused by the victim.

According to the counsel for the appellants since the event was at around 07:00 PM and referring to the case of ***Elias Yobwa@ Mkalangale Vs. Republic***, Criminal Appeal No 405 of 2015 CAT – at Dodoma, the event took place at around 7:00PM that was night according to law and authorities cited. Thus, the environment for identification were not conducive to the effect that the same was without any mistake. The victim testified that she met both victims at around 07:00 PM who took her to the unfinished house (pagala) where they had sexual intercourse with her in turns. Counsel for the appellant referred his court to the testimony of PW1, while submitting that the testimony of PW1 was not consistent as to the intensity of light the source of light.

At first, she testified that there was deem light. It was around 7:30 PM. There was a moon light which was brought enough to enable her identify

the appellants. The counsel mentioned a few shortfalls as follows: One, the witness never mentioned the accused persons early after coming out from the scene.

The evidence of identification by PW1 is against that of PW4, Rashid Mohamed. He heard someone crying and could not identify the person until when he switched on the torch. In the case of ***Raymond Francis Vs. The Republic*** [1994] T.L.R 100 at 103 it was held: -

> *"It is elementary that in criminal case where determination depends essentially on identification, evidence on conditions of favouring identification is of the utmost important".*

And in the case of ***Waziri Aman vs. the Republic*** [1980] TLR 250 it was held that

> *"It is a trite Law that no court should act on the evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence is water light"*

On this evidence the proceeding show that it is doubtful that the accused appellants were correctly and unmistakably identified by the victim.

The counsel for the appellants has invited this court to consider as well the fact that the only available evidence on identification was that of the victim. The same may be relied upon by the court under section 127 (7) of TEA. The section provides as follows:

> *"127(7) Notwithstanding the preceding provisions of this section, where in criminal proceedings involving sexual offence the only*

independent evidence is that of a child of tender years or of a victim of the sexual offence, the court shall receive the evidence, and may, after assessing the credibility of the evidence of the child of tender years of as the case may be the victim of sexual offence on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict, if for reasons to be recorded in the proceedings, the court is satisfied that the child of tender years or the victim of the sexual offence is telling nothing but the truth."

However, the overriding test is whether such testimony is trustworthy. In the case of ***Khamis Samwel Versus The Republic***, Criminal Appeal No. 320 of 2010, Court of Appeal of Tanzania at Mwanza(unreported) at Page 7 held that: -

"the overriding test to be considered by the Court before relying on the testimony of a Victim of Rape is to consider its merits and demerits and having done so, will decide whether or not it is trustworthy."

According to the provisions of section 127(7) of Tanzania Evidence Act, Cap. 6 R.E.2002, the Court has been imposed with the duty to assess the truthfulness of the testimony given by the victim of rape. And, if the court is satisfied that the victim is telling truth, then the reasons for convictions shall be recorded.

In this case, the trial Magistrate relied on the evidence by PW1 and never recorded reasons. Hence, it is the complaint by the appellant that the Magistrate erred in law and in fact for contravening the mandatory rules of procedure and law.

In ground two the appellants are complaining that the provisions of section 240(3) of the Criminal Procedure Act, Cap. 20 R.E.2002 were not complied with. At page 12 of the proceedings PW3 tendered the PF3 which was admintted as Exhibit P1. However, there is no any record which shows that the Honourable Trial Magistrate explained to the accused persons their rights to cross examine the said witness. That exhibit therefore cannot be relied upon to convict the appellants. In the case of ***Sprian Justine Tarimo Versus The Republic***, Criminal Appeal No. 226 of 2007, Court of Appeal of Tanzania at Arusha, his Lordship Justices of Appeal Rutakangwa in his wisdom had the following to say at page 9 paragraph 2:

> *"this court has held in numerous occasions that once the medical report as a PF3 has been received in evidence under section 240(1) of the Act, it becomes imperative on the trial court to inform the accused of his right of cross examining the medical witness who prepared it... the Court has, as a result, held that if such a report is received in evidence without complying with the provisions of section 240(3) of the Act, it should not be acted upon."*

This was not done in this case; it follows therefore that the admitted exhibit is of no value and thus the appellant prayed that this court expunges Exhibit P1 from the record.

The appellant in ground 4 has complained that the trial Magistrate erred in law and fact by conviction the appellants based on the wrongly charged offence. The essence of the ground is that according to the charge sheet the

accused persons are charged with the offence of Gang Rape contrary to section 131A (1) and (2) of the Penal Code, Cap. 16 R. El. 2002.

According to the Counsel for the appellant the section cannot stand in isolation with section 130(1) of the Penal Code, because this section is the one that creates an offence and section 131A(1)and (2) is explanatory section, hence charging the appellants only under section 131A(1) and (2) of the Penal Code, Cap. 16 R.E. 2002 without including section 130(1) supra prejudiced the appellants as they would not be in a position to defend themselves.

On ground 5 and 6 the appellants argue that it is difficult to understand how the Magistrate arrived at the decision he made concluding that the case has been proved beyond reasonable doubt while there was no evidence to reach to that decision. Similarly, the reasoning by the trial Magistrate that the testimony by the defence is weak to challenge the prosecution evidence. It is the opinion of the appellants' counsel that what was to be proved beyond reasonable doubt is that PW1 was gang rapped and the appellants are the perpetrators of the offence. However, that was not achieved by the prosecution.

The Respondents were being represented by Samweli Meliara, State Attorney. He submitted that the Republic is supporting conviction and sentence imposed. According to him the accused persons were properly identified by the victim as she alleged. They were known to her even before the date of event and the accused denied knowing the victim.

The Victim testified that during the incident there was enough moon light. The accused talked to the victim for a while and the incident took place for some time in duration; all these are sufficient for proper identification.

The Respondent's Counsel has submitted that the trial magistrate took the necessary precaution before making the findings that the appellants were correctly identified as per ***Raymond Francis Versus the Republic*** case. As to the compliance of section 240(3) of the Criminal Procedure Act, Cap. 20 R.E. 2002 the counsel has submitted that the law is very clear that if the person who made the document/author of the document tendered is the one testifying and tendering such document, there is no need for the Court to explain to the accused person such right to call the author for cross examination as the author is present and cross examination will be conducted eventually. Section 240(3) of the CPA is applied where the PF3 is tendered by any other person other than the author of it, that is, when the Court shall explain the right to such calling and cross examination.

As to the charge, the appellants were properly charged and properly convicted. Section 130Aof the Penal Code, Cap. 16 R.E. 2002 creates the offence of Gang rape and subsection (2) provides for the punishment thereof. Also, it is a law that in Rape cases, the testimony of the victim is essential and it is enough to ground conviction, without corroboration.

I have read the record and the submission by the parties. I would like to start by agreeing with the Respondent regarding the position for the utilization of the provisions of section 240(3) of the CPA, Cap. 20. I think only the absent author must be summoned and the rights of the accused to

summon the author should be properly explained by the Court to the accused. If the witness tendering the document is also the author of it, automatically the accused has a right to examine him or her immediately after testimony and that need no any further specific explanation.

As to the argument that section 131A of the Penal Code, Cap. 16 R.E. 2002 cannot be applied in isolation without section 130(1) of the Penal Code, Cap. 16 R.E.2002, I have the opinion it holds water. Section 130(1) provides as follows:

"130. (1) It is an offence for a male person to rape a girl or a woman.

(2) A male person commits the offence of rape if he has sexual intercourse with a girl or a woman under circumstances falling under any of the following descriptions:

(a) not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse;

(b) with her consent where the consent has been obtained by the use of force, threats or intimidation by putting her in fear of death or of hurt or while she is in unlawful detention;

(c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by any drugs, matter or thing, administered to her by the

man or by some other person unless proved that there was prior consent between the two;

(d) with her consent when the man knows that he is not her husband, and that her consent is given because she has been made to believe that he is another man to whom, she is, or believes herself to be, lawfully married;

(e) with or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man."

It is my view, section, 130(1) and (2) of the Penal Code, Cap. 16 R.E. 2002 creates the offence of Rape. And the provisions of section 131A provides for the circumstances making the offence of rape to qualify as a gang rape. The same provides as follows:

"131A. (1) Where the offence of rape is committed by one or more persons in a group of persons, each person in the group committing or abetting the commission of the offence is deemed to have committed gang rape.

(2) Every person who is convicted of gang rape shall be sentenced to imprisonment for life, regardless of the actual role he played in the rape."

Obviously from the wording of section 131A (1) of the Penal Code, Cap. 16 the offence of gang rape is defined drawing its meaning from the offence of rape. Therefore, citing only section 131A (1) and (2) of the Penal Code, Cap. 16 renders the charge deficient of the necessary ingredients of the offence of gang rape and prejudices the case against the accused person. In the case at hand it is sort of assumes that the offence of Rape has already been announced and proved to the accused persons.

I will now turn to the issue of identification and reliance of the trial court on the testimony of the victim alone to convict the accused persons. In the testimony of the victim of rape one Juliana Mohamed, who testified as PW1, the event started at around 7:00PM and there was deem light from moonlight. She could identify the accused persons. She then testified that due to long sex she fell unconscious up to late night when she went to the nearby house belonging to Rashid. PW2 says they met with one Rashid at around 8:30PM while they were looking for PW1. She was found at the house of Rashid. They examined her she was bleeding. There and until they went to the police, she never told them the person(s) who did that to her. This is not in common, if the person is found in the night at 8:30PM and says nothing about identification of the assailants until morning; that testimony leaves a lot to be desired. PW1 never even told the first person to meet on the alleged night of the event, that is Rashid Mohamed (PW4).

In the case of ***NYIGOSO MASOLWA v REPUBLIC 1994 TLR 186 (CA)*** The appellant appealed against conviction for murder. The conviction was based on the evidence of the wife of the deceased who was the sole identifying witness that she identified the accused when their house was

broken into by two bandits at night. The appellant denied ever being at the house of the deceased or slashing him with a panga. The appeal was allowed.It was held by the Court that:

> *" Circumstances prevailing in the room at the time of the attack were not favourable for proper identification of attackers and the witness never reported having identified the attacker to the ten-cell leader nor to the people who gathered at the scene.* "

I therefore find that the identification of the accused person was not clear as not to leave any possibility of mistakes. It is for these reasons that the appeal is allowed, the conviction is quashed and the sentence is set aside; and, it is ordered that the appellants are released forthwith from prison unless they are otherwise lawfully held.

T. M. MWENEMPAZI

JUDGE

25/7/2019