IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

(DC) CRIMINAL APPEAL NO 51 OF 2019

(Originating from Criminal Case No. 395 of 2017 in the District Court Moshi at Moshi)

SALIM ABDALLAH MAGANGA ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

MUTUNGI .J.

The Appellant herein was before the trial court facing the following offences: -

First count: - Assault causing actual bodily harm Contrary to Section 241 of the Penal Code Cap 12 R.E. 2002. The particulars being that on 4th day of June, 2017 at Uwanja wa Ndege Veta area, within the Municipality of Moshi in Kilimanjaro Region, did unlawfully push one SUZANA d/o LEONCE @ BOUMO from the seat car (T/Hiace) to the back

seat and thereby caused her to suffer actual bodily harm to the right side of the neck, left ear and upper arm.

Second count: - Rape Contrary to Section 130 (2) (a) and 131 (1) of the Penal Code Cap 16 R.E. 2002. The particulars being that on the same date at Uwanja wa Ndege Veta area within the Municipality of Moshi in Kilimanjaro Region, did have Carnal knowledge to one SUZANA D/O LEONCE @ BOUMO aged 20 years without her consent.

In the final analysis, the Appellant was found guilty of both counts and consequently convicted. The sentences meted out by the trial court were such that for the first count, to serve one year in prison and for the second count to serve 30 years imprisonment and the sentences to run concurrently. The Appellant was aggrieved by the decision of the trial court and has herein lodge his appeal supported by eleven grounds of appeal as hereunder: -

1) That, the Learned trial Magistrate erred in both law and fact in holding that the charge was proved beyond any reasonable doubt against the Appellant.

2) That, the Learned trial Magistrate grossly erred in both law and fact in convicting the Appellant on the irregular proceeding which offends the mandatory provision of Section 241 (1) of the CPA and Cap 20 R.E. 2002, in that the Successor Magistrate did not record the reasons for failure by the Predecessor Magistrate to complete the trial.
3) That, the Successor Magistrate grossly erred in both law and fact in convicting and sentencing the Appellant basing on the incurably and fatally defective charge sheet.
4) That, the Successor Magistrate grossly erred in law and fact when she failed to be surpluses to note that the very essential prosecution witnesses were not brought/summoned to testify e.g. arresting officer, the investigating officer.
5) That, the Learned Successor Magistrate grossly erred in law and in fact in failing to assign on record the reasons as to her satisfaction on the credibility and truthfulness of the uncorroborated evidence of the alleged victim (PW1) thus without any assessment unreservedly

believed and relied upon the testimony of PW1 to enter conviction against the Appellant.

6) That, the Learned trial Successor Magistrate erred in law and fact in holding that the Appellant was positively identified by the victim of the alleged crime while the circumstances and conditions at the scene of the alleged crime were not conducive for proper and correct identification.

7) That, the Learned Successor Magistrate erred in law and in fact when she failed to take into consideration the evidence given by PW3 (the Medical Doctor) which clearly shows that the case at hand was purely fabricated against the Appellant because in evidence he revealed that there was no penetration in PW1's vagina and he didn't see any bruises therein. Hence it is impossible for a girl who had no sex before to be raped by two people at the same time and not to be inflicted with injuries in her vagina.

8) That, the Learned Successor Magistrate erred in law and fact in holding that the Appellant was positively identified by the victim basing on the dock identification

made by PW1 which is the most unreliable and worthless evidence in criminal law.

9) That, the Learned Successor Magistrate erred in law and in fact when she failed to be meticulous to note that the victim of the alleged offence failed to describe her rapists instead, she only mentioned the half (unfinished) numbers of the motor vehicle.

10) That, the Learned convicting Magistrate grossly misdirected herself and consequently erred in both law and fact when she was preparing and formulating her Judgment and above all she did not at all give the Appellant's defence evidence the deserving weight and due consideration.

11) That, the Learned convicting Magistrate grossly erred in law and fact when she used weak, tenuous, inconsistent, contradictory, uncorroborated and wholly unreliable evidence from the prosecution witnesses as a basis of the Appellant's conviction.

When the appeal was called up for hearing, the Appellant appeared in person and Mr. Mashurano Learned State Attorney appeared for the Respondent. In contesting the

same, the Learned State Attorney submitted for all the eleven grounds of appeal as I will summarize herein under.

For the first ground, the Learned State Attorney stated that in such sexual offence cases, the evidence of the victim is the best evidence as was laid down in the case of **Fundi Omari V. Republic 1972) HCD No. 98**. In that regard the victim had told the court how the Appellant and his accomplice had caused her to suffer injuries and went on to rape her. The Doctor (PW4) did collaborate this piece of evidence in that he had examined the victim and noticed she had bruises on her neck, ears and blood stains on her neck and shoulders. The victim did further recognize the plate numbers of the vehicle the Appellant was driving which was corroborated by the evidence of the owner of the said motor vehicle. The Appellant did not deny the fact of having been the driver of the said fateful vehicle in which the victim alleged to have been raped. The Learned Counsel elaborated further that despite that, the victim had recognized just a few numbers (T.744) but these were numbers only given to the vehicle which the Appellant was driving on the material day.

As far as the second ground of appeal was concerned the Learned Attorney submitted Section 214 (1) of the Criminal Procedure Act was complied with.

As far as the third ground of appeal was concerned, the Learned Attorney clarified that as per Section 135 of the Criminal Procedure Act Cap 20 R.E. 2002 is concerned, the charge sheet was proper. The particulars referred to the offences charged and the Appellant was able to understand the offences facing him.

Submitting on the fourth ground of appeal, the State Attorney contended that, the fact that there were some witnesses not summoned, this does not in any way water down the prosecution case. He explained the Appellant had admitted in the Memorandum of the undisputed facts that he was picked during an identification parade. In such circumstance there was no need to summon the Investigator.

The Learned State Attorney on the fifth ground of appeal, he submitted the victim did properly identify the Appellant since

the offence had taken place during day light and the two had sat on the front seat together.

The State Attorney responded to the seventh ground that the trial Magistrate did consider the Doctor's testimony and that of the victim which moved the court to believe that there was rape.

On the issue of dock identification, the Learned Attorney simply stated that as per the sixth ground, the same holds no water. On the ninth ground, it was submitted that despite the victim (PW1) noting only part of the number plates but the owner (PW2) collaborated the victim's evidence that, the said vehicle was driven by the Appellant and along the Soweto route. To cement these words, the Appellant admitted he was the driver of the said vehicle on the material day. The Learned Attorney citing the case of **Amir Mohamed V. Republic [1994] TLR 138** did submit on the tenth ground that each Judge/Magistrate has her/his own style of Judgment writing what is important to note in this matter, the trial Magistrate did summarize the prosecution case, then the

defence side. She then went on to critically analyze the evidence of the two sides and came to her decision.

Lastly, the Attorney called upon the court in the eleventh ground of appeal to find that the prosecution had a strong case which was proved beyond reasonable doubt hence the appeal should be dismissed for lack of merits.

In response, the Appellant, insisted that what the victim stated was not the proper number plate (T.744 ADJ). Further, the Doctor did clear the air that he had not noticed any blood oozing out of the vagina only that there was a swelling which he could substantiate its cause.

As for the identification, this was not properly done. The victim (PW1) initially saw him while at the Police station before the parade which was contrary to the laid down principle of an identification parade. Neither did the victim mention any special merits as required by law and cited the case of **Barikiel V. Republic Criminal Appeal No. 530 of 2016 (CAT-Arusha)** to support this stance. To conclude the Appellant prayed his appeal be allowed.

At this juncture the court goes down to see what actually transpired on the fateful day. It is on record that PW1 (the victim) was working at her brother's hotel (one Abdi) located at Kibo tower and had just finished working in the evening at about 18:00 hours. She had located to a new area at Soweto hence she had to get transport back home. Being a new residence she had been using the services of a Bodaboda. Unfortunately, he was by that time still occupied and advised her to get a Hiace (bus) to Soweto. It took about 15 minutes for the Hiace to get full then they left. On the way, the Hiace kept on stopping and passengers alighting and other boarding. PW1 decided to call the Bodaboda guy to explain and tell the driver (Appellant) where she was to be dropped (Soweto).

It would seem the route had come to an end as all the passengers had all gotten out. The conductor and the driver (Appellant) told her not to worry they were yet to take her to where she would alight. To her surprise she saw the Hiace stopping at a narrow pathway and she became suspicious. After the two had talked for some time the conductor came back and started touching her breasts. The Appellant who

was now seated with the victim at the front seat, started touching her and ordering her to get to the back seat. She sensed danger and started shouting for help, but it was already too late and they both pushed her to the behind seat. The conductor started removing her tights and underpart and removed his trousers getting out his penis and penetrating through her vagina by force. She felt a lot of pain and started bleeding. After he had finished with her the Appellant had his turn and removed his trouser and inserted his penis onto her vagina. They had in the process strunggled her by the neck and inflicted her with injuries.

After they had satisfied themselves, she pulled up her underpants and tights. She could not see her shoe and so started looking for it under the Hiace. The two culprits also got out to look for her shoe. She took this chance to record the number plates with the assistance of her mobile phone (touch). As she flashed the touch she saw the number T.744. She told them she had seen the shoe and they got back to the Hiace. As they came to the tarmac road, they dropped her. She was helped by a lady driving a Noah who took her to Twiga hotel where she was previously staying, she narrated

the incidence to the guard and her brother and was later taken to hospital (Mawenzi). She narrated she had identified the two (Appellant and Conductor) by their physical appearances. The driver (Appellant) was a bit tall and black and by that time at 18:00 hours there was still sunlight.
After medical examination it was revealed she had been raped and treated for neck injuries. She was after some time taken to an identification parade and managed to point at the Appellant by touching his shoulder while standing in the third position from the back.

PW2 who was the vehicle's owner joined hands that his vehicle T.744 ADJ was driven by the Appellant and they had agreement to work for six days and one be reserved for a day off (to worship). Even on the material day the Appellant had the said vehicle (Toyota Hiace) plying through Memorial, Sido and Soweto. He later learnt that the Appellant and the Conductor were alleged to have raped PW1.

PW2 the owner of the hotel where PW1 was working had the same story which he learnt from PW1 of how she had used the Hiace to take her to Soweto. She had to phone the

Bodaboda guy who was transporting her to tell the conductor where she should be dropped. To her surprise the vehicle was stopped at a rough road along Veta area and the conductor had already gotten out and removed his shirt. The two forced her from the front seat to the back seat and each had a round of raping her. They had in the process held her neck tightly and caused neck injuries. She cheated them into believing she had lost a shoe, so when she got out, she managed to see no. T.744 which she had memorized. After this the victim was taken to the Police station and to the hospital for treatment. After about a week she was re-called to the Police station in an identification parade where she identified the Appellant.

PW4 (the Medical Doctor) explained how he examined PW1 (the victim) and found bruises around her neck, ears and some blood dots on her right hand. She had no bruises around her private parts and her underpant was clean. This was due to the fact that she had washed and changed the underpant and he noticed she was not a virgin (the PF3 was tendered as Exhibit P1).

The Doctor further explained that if she (victim) had washed herself, it was not easy to see any discharge. If there was no resistance then no bruises and spermatozoa would be seen if she has washed herself.

In his defence, the Appellant simply stated he was stopped by Traffic policeman and taken to an identification parade where a young girl touched him by his shoulder. He knew nothing about the offence nor was his vehicle's registration no. T.744 but T.744 ADJ.

The issue then would be, **first** whether the victim (PW1) was raped **second**, whether the Appellant was the one who raped PW1 (the victim). There is a plethora of decisions by the Supreme Court of this Land as to what constitutes the offence of rape. It has been settled in our jurisdiction that for the offence of rape to be established there must be proof of penetration one such authority is the case of **Barton Mwipabilege V. Republic, Criminal Appeal No. 200 of 2009 (unreported)** where the court stated: -

> *"Time and again, it has been said by this court that, it is not enough for the victim of rape to say that she was*

"raped". She must also further allege that there was penetration however slight".

Further in the case of **Ex-B 9690 SSGT Daniel Mshambala V. Republic, Criminal Appeal No. 183 of 2004 (unreported)**, the Court of Appeal held as follows: -

"PW1 ought to have gone further to explain whether or not the Appellant inserted his penis into her vagina, whether or not the penetration was slight etc."

In the present case at page 11 of the proceedings the victim stated then the driver undressed his trouser,

"akachukua mboo yake halafu akaingiza kwenye kuma yangu, akawa anaingiza na kutoa na nikasikia maumivu. "

This piece of evidence is very clear that there was penetration. It would seem the Appellant in his grounds of appeal was suggesting that there was no medical proof of penetration since the Doctor did not establish that the victim had bruises or there was blood. In the case of **Prosper Mjoera**

Kisa V. Republic, Criminal Appeal No. 73 of 2003 (unreported), it was held that,

> *"Lack of medical evidence does not necessarily, in every case mean that rape is not established where all other evidence point to the fact that it was committed"*

PW2, the victim's relative did collaborate PW1s' evidence that he saw the victim immediately after the commission of the offence who was in tears and pains. She complained of the neck pains and elaborated at length how she had been raped by two people one of whom was the Appellant.

One could raise a doubt as to the credibility of the victim as the only witness. The court should not Labour much on this point. The decision in the case of **Seleman Maumba V. Republic, Criminal Appeal No. 94 of 1999 (unreported)** which states that: -

> *"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 women where consent is irrelevant that there was penetration."*

The above decision says it all coupled with the narration of the victim, which was eloquently done. Having dispassionately considered the evidence, the court is satisfied that the victim was raped and in the course injured as established by the PF3 (Exhibit P1).

Now, to the second issue this will entirely be based on the aspect of identification. It is gathered from the evidence that the victim had been in the said Hiace for 15 minutes waiting for the same to be filled up. All this time she could see both the Appellant (the driver) and the conductor who is still at large. As if not enough she was in communication with both the driver and conductor the entire time for the reason that she did not know her destination. She later moved to the front seat and had a conversation with the Appellant.

There is further strong evidence that, the time she got into the said vehicle there was still a lot of light hence the visual environment was conducive and favorable for adequate and correct identification. The court is alive of the legal principle in the celebrated case of **Waziri Amani V. Republic [1980] TLR 250** which is that."

"In a case involving evidence of visual identification, no court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight"

In the instant case the evidence was indeed watertight. To add salt to the wound the victim was able to take note of the number plate after a brave move of pretending to look for her lost shoe. She managed to get out and since time had passed, she was able to note the plate number using her mobile touch. There is an argument by the Appellant that she had mentioned only half of the number plates "T.744" but her mentioning of this number facilitated to get the vehicle and its owner (PW2) who admitted that the Appellant was the driver of the said vehicle on the material day. The victim was also subjected to an identification parade where she readily identified the Appellant.

The Appellant would seem to contest the legality of the identification parade, in that the Investigator or parade Instructor were not summoned. As properly submitted by the

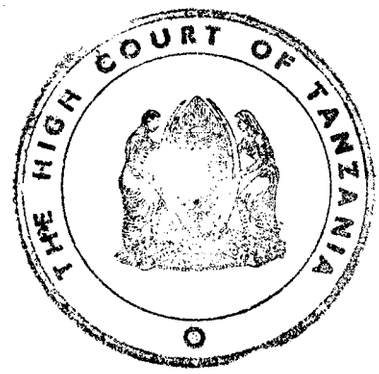
Learned Attorney this was one of the undisputed facts during the preliminary hearing. To cap it all the victim identified the descriptive features of the Appellant. She stated at page 12 of the proceedings, **"I identified them on the date of incident, the conductor was short, the driver was a bit tall, they were all black."**

Following the above analysis, the question of mistaken identity does not arise, it is watertight that the Appellant did rape the victim.

There is a complaint raised by the Appellant that the Successor Magistrate did not record the reasons for failure of the Predecessor Magistrate to complete the trial. It is on record at page 32 of the proceedings that the Successor Magistrate did give reasons which was communicated to the Appellant and both parties agreed to proceed with the case.

In the upshot, the court is of settled mind that the prosecution side did prove the case beyond all reasonable doubt and

the Lower Court rightly convicted and sentenced the Appellant. It follows the appeal is dismissed for want of merits.



B. R. MUTUNGI

JUDGE

24/03/2020

Read this day of 24/3/2020 in the presence of the appellant and Mr. Omari Kibwana (S.S.A) for the respondent.

B. R. MUTUNGI

JUDGE

24/03/2020

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI

JUDGE

24/03/2020