IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

CRIMINAL APPEAL NO. 55 OF 2020

(Originating from Criminal Case No. 257 of 2018 in the District Court of Rombo)

DANIEL CHARLES COLNER @ BAHATI .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGEMENT

MUTUNGI .J.

The appellant was charged before the District Court of Rombo with one count of rape contrary to **Section 130 (1)(2)(b) and 131(1) of the Penal Code Cap 16 R. E 2002**. It was alleged that on 15th day of October, 2018 at about 01:00hrs at Kingachi Village, within Rombo District in Kilimanjaro, the appellant did have carnal knowledge of one AKWILINA d/o SELESTIN a woman of 85yrs without her consent.

The accused pleaded not guilty and thereafter the prosecution mashalled six (6) witnesses to prove the offence. The defence had one witness only. After hearing both sides, the trial magistrate was satisfied, the prosecution had proved its case to the required standard and convicted the appellant as charged, sentencing him to thirty years imprisonment.

Aggrieved, the appellant has filed the present appeal based on 7 grounds of appeal. The grounds are as follows;

1. *That the trial magistrate erred in finding that the prosecution side has been able to prove their case without any reasonable doubt.*
2. *That, the trial magistrate erred in both law and fact in holding that the appellant was the one responsible for the alleged incident since the circumstances for the proper identification were not conducive at all.*
3. *That the trial magistrate erred in law and fact in convicting and sentencing the appellant without warning himself and considering the doctrine of identification,neither spoke of itall for it was of utmost importance in this case.*
4. *That, the trial magistrate erred in both law and fact in failing to notice that there was a material discrepancy*

between PWI (the alleged victim) and PW5 (the alleged Doctor) pertaining the age of the victim also on the alleged time of the incident.

5. *That, the learned trial magistrate erred in both law and fact in not assessing the evidence presented objectively since it was not reflecting the reality since it was not explained how could the appellant manage to drag the victim by himself without any resistance neither was the alleged torn "kaptura" brought as an exhibit.*
6. *That, the trial magistrate erred in shifting the burden of proof by faulting the appellant defence despite the fact that the appellant is a layman and unrepresented and also it was the prosecution duty to prove their case without reasonable doubt.*
7. *That, the trial magistrate erred in admitting exhibit P1(PF3) which was identified and tendered by PW5 without any knowledge on how it got its way to the court(chain of custody)*

When the appeal was called up for hearing, the appellant appeared in person, while Mr. Ignas Mwinuka, learned State Attorney advocated for the Respondent/Republic.

The parties agreed to proceed by way of Written Submission.

Submitting to the 1st ground of appeal, the Appellant simply stated, the prosecution case was not proved to the required standard as per section **3(2) and section 110 of the Evidence Act, Cap 6 R.E 2002**.

The Appellant submitting on the 2nd and 3rd grounds of appeal contended, the trial magistrate convicted and sentenced him without satisfying herself if at all he was the one who committed the said offence. The identification circumstances were not conducive, neither did the trial magistrate explain or give reason as to why she concluded that it was the Appellant who had committed the offence.

The Appellant further submitted during the examination in chief, the victim alleged to have heard her door breaking and this was around 01hrs and a man entered the room holding a torch. Given such a scenario, it presupposes the room was totally dark. Further PW1 had testified to have seen the appellant's face and also identified his clothes, shoes and his voice. One would then wonder how long did the said torch stay on to enable the victim identify the culprit. Further questions would be how long did the alleged incident take and how could the suspect hold the

torch and at the same time scare the victim with a knife and *'rungu'* while slapping and holding the victim's neck and ultimately dragging her outside.

The appellant also contended that PW2 who claimed to have identified the appellant, during the commission of the offence was at the time hiding under the bed and still managed to see the Appellant's face and properly identified him. The appellant argued in such circumstances it is beyond comprehension how there was no mistaken identity of the culprit. He submitted further it is not easy for a person in the dark, suddenly wakes up from sleep, is able to see properly while a torch points at his or her face.

The Appellant cautioned the court by referring to decided authorities which held, identification is of the weakest kind and most unreliable evidence which should be taken upon caution and the court is to be satisfied the evidence is watertight. The cited cases are **Waziri Amani vs Republic 1980 TLR 250, Hassan Said & Suleman Ally vs Republic, Criminal Appeal No. 44 of 2002, Nhembo Ndalu vs Republic Criminal Appeal No. 33 of 2005 and Dorika Kagusa vs Republic Criminal Appeal No. 174 of 2014 (all unreported)** in support thereof.

He further defined water tight evidence as in **Nhembo Ndalu's case** that: -

> *"In law, then for evidence to be watertight, it must be relevant to the fact or facts in issue, admissible, credible, plausible, congent and convincing as to leave no room for a REASONABLE doubt''*

In view of the foregoing the Appellant submitted, the prosecution evidence was premised on very weak grounds. Despite such findings, the trial magistrate did not make reference to the aspect of identification to justify the conviction against the appellant which violates the mandatory requirement of **Section 312 of the Criminal Procedure Act Cap R.E. 2019**.

Regarding the 4th ground of appeal, the Appellant submitted, the victim had mentioned two different ages. She had earlier told the Doctor (two months before) that she was 85 years old. She changed her age to 80 years while testifying in court. In the appellant's firm opinion this puts the victim's credibility to question. The trial court ought to have dealt with her testimony with caution.

Submitting on the 5th ground of appeal, the Appellant elaborated the court was duty bound to treat and assess the prosecution case objectively. For any stretch of imagination a young man of his age could not have dragged an old woman (85 years old) outside the home without any assistance. It should also be considered that it is alleged he had a weapon and a torch while dragging the victim which beats logic. He thus prayed this court being the 1st appellate court to re-assess and re-evaluate the evidence of PW1 and PW2.

As far as the 6th ground of appeal, is concerned, he submitted, by the court finding that his defence had not shaken the prosecution case, then the court had shifted the burden of proof on him. As long as the prosecution case was pegged on identification, then they had a duty to prove that PW1 had not mistaken him for someone else beyond any shadow of doubt. Simply stating that the victim knew him as he used to ask for sugarcane did not mean she identified him more so when it was dark (in the night).

Addressing the 7th ground of appeal, the Appellant submitted, the admission of the PF3 (Exhibit "P1") did not follow the procedure. There was no explanation of how it

landed in court. The Doctor was simply asked to identify the same before it was admitted in court. There was definite a procedural irregularity hence the same should be expunged from the record.

He concluded by submitting, this court should consider the grounds of appeal and find in his favour. The prosecution case is definitely tainted with a lot of doubts once done his appeal should be allowed.

Reacting to the grounds of appeal, the learned State Attorney grouped the grounds into two categories, those based on evidence which are 1st, 2nd, 3rd, 4th, 5th and 6th grounds of appeal and one ground premised on procedure.

Responding to 1st -6th grounds of appeal, the learned state Attorney submitted there are no hard and fast rules that govern the aspect of identification. However, considering the circumstances pertaining in this case, there is no doubt that the appellant was properly identified by the victim and PW2. First and foremost the appellant was very familiar to them for the reason, he was their neighbour. The incidence itself took long such that it was enough for a proper identification. To put salt to the wound, there was enough light from his torch. More so PW1 and PW2 had

mentioned the appellant's name to PW3 and PW4 immediately after the commission of the offence. It was hence easy to arrest him.

Submitting on the variation of age as complained by Appellant, the learned state attorney submitted if at all there was such variation the same is minor and does not go to the root of the case, neither can it shake the prosecution case. By any standards it cannot exonerate the solid evidence marshalled by the prosecution side.

Buttressing on the procedural irregularity which touches the 7th ground of appeal, it was submitted, the foundation upon which the disputed exhibit ("P1" a PF3) was admitted was properly laid down. Over and above the exhibit was admitted without any objection from the appellant. It was the learned Attorney's reaction that, raising the objection at this stage was merely an afterthought. In totality the learned Attorney prayed the appeal be dismissed for want of merit.

What then did transpire on the material day? It is on record that while (PW1) the victim was asleep in her home together with her great granddaughter (PW2), suddenly the appellant did break into their home. He forcefully entered the victim's room fully armed with a rungu,

machete (panga) and had with him a torch. He attacked PW1 and elderly lady with fists and slaps demanding to have sex with her. There was an extensive exchange of words between the two. PW1 did in the course identify his voice and clothes and begged him to spear her life but he mercilessly dragged her outside to the farm and raped her. Meanwhile when all this was happening PW2 had ran and was hiding under the bed. She too identified the appellant since he was very familiar to her. After the ordeal was over, the appellant left the victim lying on the ground hopelessly. The neighbours got information from PW2 including PW3 and the village leader (PW4) of what had transpired. Both PW1 (victim) and PW2 mentioned the appellant as the culprit. Immediately the appellant was arrested at him as he tried to enter therein. He was in a suspicious state since he had dust all over his body. The victim was taken to hospital for medical examination and found to have been raped.

I now turn to the grounds of appeal, I have carefully perused the record, grounds of appeal and the rival submissions thereto, the following are the issues for determination.

1. Whether the prosecution had proved its case to the required standard.
2. Whether there were procedural irregularities.

Starting with the ***first*** issue which is geared at answering the 1st, 2nd, 3rd, 4th, 5th and 6th grounds of appeal, the appellant has complained that he was no properly identified and the trial court did not consider this aspect. On the other hand the respondent responded there were glaring circumstances which led to the proper identification of the appellant by PWI and PW2. These include the fact that PW1 and PW2 were the appellant's neighbours hence familiar with each other, ***secondly***, the commission of the offence took a long time. ***Third***, the light from the appellant's torch was sufficient to identify the appellant and lastly he was mentioned by the victim and PW2 to PW3, PW4 immediately after the incidence which led to his arrest at the soonest possible time.

I have perused through the judgement of the trial court and found nowhere did the trial magistrate discuss the issue of identification. The trial court ought to have discussed the issue of identification as the incident occurred during the night and this is the only piece of evidence connecting the

appellant to the offence. For ease of reference the trial magistrate at page 7 of the judgment stated: -

"The victim in our case at hand stated that the accused after bulging in her house he did asked for sex and he was told to take everything but not to touch her something the accused didn't comply instead he drugged her out and raped her."

Since the trial magistrate didn't expound on the issue of identification which is a non-direction on the part of the trial court, this being the first appellate court, I have the duty to discuss the same. In the case of **Stanslaus R. Kasusura & Attorney General vs Phares Kabuye [1982] T.L.R 338**, the court highlighted the importance of evaluating each witness and assessing their credibility, and then to proceed therefrom.

Also, in the case of **Deemay Daati v & 2 Others vs R [2005] T. L. R. 132**, the Court ruled the Appellate court is entitled to look at the evidence and make its own findings of fact where there is misdirection and non-direction on the evidence.

The issue of visual identification has been discussed in numerous decisions, and the most celebrated ones are the

cases of **Waziri Amani vs the Republic [1980] TLR 250, Jaribu Abdalla vs Republic Criminal Appeal No. 220 of 1994 and Raymond Francis vs Republic [1994] TLR 100.** In these cases the test factors or ingredients for identification include, the period under which the person was under observation by the witness, the distance separating the two during observation, whether there was enough light, whether the witness had seen the accused before, whether the witness faced obstruction which might interrupt the concentration and ability of the witness to name a suspect at the earliest possible opportunity.

I will now test the evidence of PWI and PW2 to see if it meets these requirements. PWI while testifying had this to say;

> ***"I only saw him, he was the accused person, he wore the same dresses as today. He was close to me, I identified his voice too, his shoes and I saw his face too.....***
>
> ***I have no grudges with accused we pray same 'jumuiya"***
>
> *"I identified him by face, voice and clothes as he is now ....*
>
> *He came to my house to ask for sugar cane several times*

I know the accused since he was a child."

PW2 said,

> ***"On 15.10.2018 at 01hrs we heard a big knock there granny asked do you hear that? I told her yes there she was lighted by a torch, there I saw the accused face, he wore a jeans trouser, but like those of police and the same t-shirt he wore today.... he stayed like 15min with granny ..."***

While cross examined, PW2 said;

> ***"I identified you by torch light which you lighted granny and it reflected you and I saw you"***

The evidence further reveals that soon after the incident the victim informed PW3 that the accused had raped her. PW2 also named the accused immediately on PW3's arrival at the scene of crime. The accused was then arrested by PW4 and the militia men. To collaborate PW1 and PW2's testimonies PW4 narrated;

> ***"I told sungusungu to go to Bahati, hurriedly we went to his house suddenly when we reached there we saw him coming back too at 1hrs we look at him we saw he was dirty he wore a jeans trouser and he had dread locks.."***

From the evidence depicted in the record, the points of identification were, ***first*** the witnesses and accused are neighbours the reason they recognized his voice and face, ***second***, PWI knew the accused since his childhood, ***third***, the nature of offence is rape and so PWI was in a better position to recognise the accused at a close range. ***Fourth***, the victim and PW2 named the accused soon after the incidence. ***Fifth***, they both (PW1 and PW2) managed to see the appellant with the help of the light from his torch. ***Sixth***, they clearly described what he wore on that night. ***Seventh,*** the commission of the offence took a long time, giving the witnesses ample time to properly identify the appellant.

The appellant was trying to punch holes in the prosecution case when he wondered how he could have held the torch and at the same time drag the victim outside single handed. I find the torch was not the only factor which helped the victim to identify the accused, there were other factors as listed above which included his voice and the proximity with the witnesses. With such glaring and watertight evidence, there was no possibility of mistaken identity. Though the appellant did not touch on the rape itself, but the court is of a firm view that, the evidence

should be mentioned, since the same was the narration referring to what he did after PW1 had identified him. In the handwritten proceedings it is recorded;

"When he dragged me, he tore my "kaptura" I wore he took his penis "mboo" and took it inside my vagina "kuma" I told him I didn't do this for a long time since 1986 when my husband died. "Alinitomba". I did nothing as I was tired, he pie sperms and then he left me."

Considering the above descriptive narration and the prevailing circumstances it is crystal clear that PW1 (the victim) without any shadow of doubt had known it was the appellant and no other who raped her in line with the provisions of **Section 130(1)(2)(b) and 131(1) of the Penal Code, Cap 16 R.E. 2019**. PW2 assisted to collaborate PW1's evidence that the culprit was appellant and no other.

Turning to the issue of discrepancy of evidence regarding the age of the victim, whether PW1 was 85 years old while the Doctor stated she was 80 years. I have gone through the records both typed and hand written, I find the typed proceedings regarding the age of PWI are different from the hand written records. As per the typed proceedings PW4 is recorded to have received a patient of 80 years. The handwritten proceedings show PW4 said, ***"I received a***

patient of 80+ years." In my settled view, this was an old lady and the bottom line is that she was above 80 years old. This discrepancy is minor and does not go to the root of the case as properly submitted by the learned Attorney.

The Appellant touched on the burden of proof which he alleged had been shifted from the prosecution to the defence side. What the trial magistrate said at page 7 of the typed judgement is that, the defence case did not cast any doubt in the prosecution case. The court is alive that in criminal cases the burden of proof is on the prosecution and the standard of proof is beyond reasonable doubt. Since the appellant did not shake the prosecution case which in my view was water light, this does not imply that the burden of proof had shifted. It was wrong for the appellant to complain as submitted in the 6th ground of appeal hence the ground fails.

With regard to the allegation that the trial magistrate erred in admitting Exhibit "P1" (PF3) which in his view appeared from the blues. I took time to go through the record to see if there was any objection from the Appellant when admitting the same as held in the case of **Abas Kondo Gede vs Republic, Criminal Appeal No. 472 of 2017**.

At page 16 of the typed proceedings the accused stated he had no objection and the court proceeded to admit the PF3 after the prosecution had laid the foundation for its admission. Since the Appellant did not object the admissibility of exhibit P1 he cannot challenge it at this stage, for that the 7th ground of appeal lacks merit.

In light of the analysis made, I find this appeal has no merit and is accordingly dismissed. It is so ordered.

B. R.MUTUNGI
JUDGE
28/5/2021

Judgment read this day of 28/5/2021 in presence of the Appellant and in absence of the Respondent dully notified.

B. R. MUTUNGI
JUDGE
28/5/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
28/5/2021