

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA

HC. CRIMINAL APPEAL NO. 90 OF 2021

(Arising from the decision of Nyamagana District Court in Criminal Case No 08 of 2020,
Delivered on 9th July by J.J. Ryoba – RM)

MAGESA ALEX 1ST APPELLANT
BAUS SAID BAUS 2ND APPELLANT
MESHACK ELIAS ZONZOLI 3RD APPELLANT

versus

THE REPUBLIC RESPONDENT

JUDGMENT

11th & 30th August, 2021

RUMANYIKA, J.:

According to records one having had been charged and arraigned in the district court of Nyamagana (the trial court) on 30/1/2020 for the charges of armed robbery (1st & 2nd counts), gang rape, again armed robbery and rape (3rd, 4th and 5th counts) Contrary to Sections 287 A, 131 (1) and 131 A (1) and (2), 287 A and 130 (1) (2) (a) and 131 of the Penal Code Cap 16 RE. 2019 respectively, Magesa Alex, Baus Said Baus, Meshack Elias Zonzoli and Peter Joseph Maseke (the 1st, 2nd, 3rd, 4th and 5th appellants) respectively, except the 4th appellant they were convicted and sentenced for the terms ranging between 30 years to life imprisonment

and the sentences run concurrently. They were aggrieved, here they are with 6 grounds of appeal that boiled down to 4 points essentially: -

- 1) That the prosecution case wasn't actually proved beyond reasonable doubts.
- 2) That the evidence of gang rape it needed corroboration but there was no such evidence.
- 3) That actually the appellants were not properly identified.
- 4) That the trial court ignored the appellant's defence evidence.

When, by way of audio teleconference the appeal was called on 11/08/2021 for hearing, Messrs D. Mtete on one side and Mashauri and Nyenji learned counsel on the other they appeared for the 1st and 3rd appellants respectively. Ms. L. Meli learned state attorney appeared for the respondent Republic. I heard them through mobile numbers 0785 566 210, 0769 430 502 and 0717 418 929 respectively.

Mr. D. Mtete learned counsel submitted; **(i)** that the prosecution evidence needed be corroborated (the case of **Hassan Amini Ngorongoro v. R**, Criminal Appeal No. 64 of 2021 (HC)) at Mwanza unreported leave alone, with respect to the alleged victims of rape the silent police form No.3 much as its production in court contravened

provisions of Section 240 of the Criminal Procedure Act Cap 20 RE. 2019 therefore appellants were not fairly heard. However best the victim's evidence might be much as she did not even bear bruises in the vaginal cavity **(ii)** the 1st appellant wasn't found in possession of arms or something, if anything, the latter was simply apprehended. That had the appellant's defence been considered the trial court would have arrived at a different conclusion.

Mr. Mathias Mashauri learned counsel argued grounds 1,3 and 5 combined and he submitted that; **(a)** that as such Contrary to Section 3 (2) (a) of the Evidence Act Cap 6 RE. 2019 the prosecution case wasn't beyond reasonable doubts proved. That the 1st appellant may have had been red handed arrested yes, but he was not properly identified by aid of a torch and or electric light? Much as the charge sheet did not disclose the time the offence was alleged committed (case of **Waziri Amani v.R** (1980) TLR 250 (CA) and torch lights dazzled (the case of **Isaya Mato Issa v.R**, Criminal Appeal No. 173 of 2020) **(b)** that the evidence of identification parade it wasn't properly procured because if anything already the identifying witnesses were prejudiced. That is all.

Ms. K. E. Nyeji learned counsel submitted; **(a)** that with respect to rape charges actual penetration wasn't proved in the first place no bruises or something noted **(b)** that the victim's brother needed to corroborate the evidence but for no reasons at all the latter did not even appear in court that on that one the court therefore was entitled to draw adverse inference **(c)** that against the appellants the case was fabricated leave alone, with respect to the source of light, electric lamp or a torch, whether or not the culprits were 3 or 5 and so forth. That Pw2's evidence was contradictory and it needed to be discounted **(d)** That there was no proper but a mere dock identification leave alone Contrary to the PGO No. 232 (k) the improperly mounted identification parade **(e)** That with respect to visual identification of the 2nd and 3rd appellants the possibilities of mistaken identity were not all eliminated (the case of **Siku Salehe v.R**, (1987) TLR 192 (HC)) unless the conviction was such water tight, the trial court just ignored the appellant's defence evidence. That is all.

In reply, Ms. Lilian Meli learned state attorney readily supported the entire appeal for one main reason that with exception of the 4th accused not a party in the instant appeal, visual identification of the appellants was not proper because the description given by the victims concerned only


the 2nd and 3rd appellants who also were said to have been identified at the police mounted parade but it excluded the 1st appellant (case of **Francis Majariwa & 2 Others v. R**, Criminal Appeal No. 139 of 2005 (CA) at Mwanza), unreported. That dock identification was worthless except a properly mounted identification parade that, if anything, the doubtful surroundings of the 1st appellant's arrest should have been resolved only in favour of the latter much as the victims did not know the appellants before. That is all.

I allowed the appeal and ordered immediate release of the appellants from prison but I reserved reasons therefor here they are;

The pivotal issue is whether in any case the prosecution case was proved beyond reasonable doubts. As such, wisely and professionally so in my considered view, Ms. L. Meli learned state attorney cut the long story short the 5 victims might have been offended yes, but like the learned defence counsel argued, and, precisely so now supported by the learned state attorney, the appellants could, free of any mistakes not be identified under such unfavourable circumstances (cases of **Siku Salehe** (supra) and **Waziri Amani** (supra) leave alone such a number of obvious shortcomings in the alleged police mounted identification parade. Until such


time, but contrary to the trite law when appellants were identified in dock this one, in my view it was worth the name no good evidence (see the case of **Francis Majariwa Deus and 2 Others** (supra)).

As said, it is for all the above narrated reasons that having had allowed the appeal, quashed the decision and set aside the orders I reserved on 11/08/2021.



S. M. RUMANYIKA
JUDGE
30/08/2021

The reasons for the decision delivered in chambers this 30/08/2021 in the absence of the parties.



S. M. RUMANYIKA
JUDGE
30/08/2021