IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 69 OF 2020

(Originating from Criminal Case No. 185 of 2019, in the District Court of Moshi at Moshi)

AUGUSTINO ANDREA MOSI @ AMANI..... 1st APPELLANT
ERIC ALOYCE NGOI @ MAPENDO ..... 2ND APPELLANT
JOSEPH JOSEPH MOSHA @ SHUKURU..... 3RD APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

MUTUNGI .J.

The appellants were jointly charged before the District Court of Moshi at Moshi (the trial court) for the offence of unnatural offence contrary to **section 154 (1) (a) of the Penal Code, Cap 16 R.E 2002 now R.E. 2019.**

According to the evidence adduced at the trial court, it was alleged on 19th April, 2019 at Kirua Vunjo area within Moshi District in Kilimanjaro Region, the appellants jointly had carnal

knowledge of **JPM** (true identity hidden) against the order of nature. The appellants denied the allegations hence a full trial which involved four prosecution witnesses and four defence witnesses.

Briefly it is on record, the victim on the material day was at Juma's shop buying and drinking local brew commonly known as "mbege". He was later joined by the appellants, and even bought the first appellant some "mbege". The appellants then left the area. At about 7:00 p.m. the victim also left for home. On the way, the victim met the third appellant who called him by the road side. This is when the ordeal started. They undressed him, undressed themselves, removed their male organs and then one after the other penetrated through the victim's anus. He was able to recognize the appellants' faces, with the help of a bulb light, coming from a nearby house.

The victim tried to call out for help but he got no assistance at all. Luck was on his side that, he managed to escape leaving behind his clothes. He went and slept till the following morning when PW3 came along holding his clothes which he had picked outside the victim's home. He had gone to

collect him to help in construction. The victim then narrated to him what had transpired the previous day and mentioned the appellants as his culprits. PW3 then reported to the street chairman who gave them a letter to proceed to the police station. Thereafter the victim was taken to hospital for medical examination. The Doctor who examined him observed the victim had bruises all over the body and was mentally retarded. The Doctor further observed, the victim had bruises in his anus caused by a blunt object inserted therein as evidenced by the PF3 (Exhibit "P3"). After a thorough investigation PW2 arrested all the mentioned (appellants). They all denied to have assaulted and sodomized the victim.

In the end the trial court was satisfied the case against the appellants was proved at the required standard, convicted and sentenced each to 30 years imprisonment. The appellants were aggrieved hence this appeal on the following grounds: -

1. That, the learned trial magistrate erred in law and fact in holding there was proper identification of the appellants

by the victim taking into consideration that he was intoxicated.

2. That, the trial magistrate erred in law and fact in overlooking the credibility of the PW1 which was weak and unreliable.
3. That, the trial magistrate erred in law and fact in considering the fact that did not report the act of being sodomized at the earliest opportunity he got.
4. That the trial magistrate erred in basing her evidence on section 127 (7) of the Evidence Act while PW1 was a contradicting witness and even corroborated 2nd appellant's defence.
5. That, the trial magistrate erred in not properly assessing the defence evidence.
6. That, the trial magistrate erred in law and fact in failing to adduce reasons for reassignment to the appellants after she received the case file from the predecessor magistrate.
7. That, the trial magistrate erred in law and fact in failing to note that the PW3's testimony was suspicious.

It was ordered the appeal be argued by way of written submissions. In view thereof the appellants proceeded in

person/unrepresented while the respondent was represented by Mr. Ignas Mwinuka, learned state attorney.

In view of the first ground of appeal the appellants submitted, the victim was still drinking 'mbege' around 19:00 hours, then the only possible time when the offence might have been committed was around 20:00 hours. It was hence obvious by then it was dark for one to properly identify his assailants. To make matters worse the victim was already intoxicated, much so he had mental problems. With these two conditions, there was a high possibility that the victim could not properly identify the appellants. Considering the issue of identification is fundamental, the court ought to have fully satisfied itself before relying on such evidence to eliminate the possibility of mistaken identity. The trial magistrate's holding that "the dark was not heavy" without properly analyzing the intensity of light around was erroneous.

On the 2nd and 3rd grounds the appellants submitted, PW1 testimony was weak and unreliable on the ground that, he never reported anywhere after allegedly being sodomized. Despite the fact that, he lives with his brothers and sisters in the same house, he silently entered therein and slept naked

having escaped the sexual assault, still he never reported to them of what befell him. Even after PW3 bringing him his clothes the following morning, he did not mention the appellants by name.

Regarding the 4th ground the appellants submitted, the trial magistrate based her verdict on **section 127 (6) of the Evidence Act, Cap 6 R.E. 2019** while the victim's evidence was contradictory. He testified to have been drinking "mbege" at his home, at the same time he was walking back home when the 3rd appellant grabbed him into the maize farm, and not road side. The victim alleged the 2nd appellant was inside the house preparing "mbege" but later testified he had left the area. All these inconsistences are fatal and the trial magistrate ought to have disregarded his testimony.

Submitting on the 5th ground, the appellants claimed the trial magistrate did not consider their defence testimonies when assessing the evidence and reaching the verdict.

On the 6th ground the appellants argued, they were denied right to a just and fair trial on the reason, the case initially had been before Hon. B. T. Maziku but later transferred to Hon. R. G. Olambo with no reasons advanced contrary to the

dictates of **section 312 of the Criminal Procedure Act Cap. 20 R.E. 2019**. They were in the circumstances afforded no reasons for the re-assignment which prejudiced their rights and caused them injustice.

Lastly, the appellants argued, PW3's evidence was not credible from the fact that, he denied to have known the appellants while in fact they had known each for a long time and were living in the same village. Further, it would seem surprisingly PW3 had more pains and love for the victim than his brothers and sister who were around on the material day but did not witness the commission of the offence. In conclusion they prayed this court being the 1st appellate court should re-assess the evidence and make its own findings.

In reply, Mr. Mwinuka submitted, they support the appeal on the reason there was no proper identification of the assailants. The incident occurred at night in absence of conducive conditions for positive identification. He asserted the intensity of light was never explained as held in the case of **Raymond Francis .V. The Republic [1994] TLR 100**. Be as it may the victim was already intoxicated with alcohol. He

conclusively supported the appellants' appeal. There was no rejoinder.

Having considered the parties' submissions, the trial court's records and the fact that the respondent supported the appeal on the ground of identification, my deliberation and ultimately determination on this appeal will therefore base on that ground alone. This is where the foundation of the respondent's case lies.

It is undisputed the trial magistrate misdirected herself in convicting the appellants without analyzing the evidence and eliminating all possibilities of mistaken identity. The law is clear and the Court of Appeal numerous decisions are at one that, identification is of the weakest kind of evidence and the court should satisfy itself before relying on it. I am inclined to agree with both sides that the circumstances were not favourable for adequate identification of the appellants. The crime which the appellants were convicted for took place around 19:00 hrs to 20:00hrs hours and the light relied on was from a bulb that was on at PW1's (the victim) brother's house. However, the intensity of the said light and the proximity of the appellants at the scene of crime was never

substantiated. It would seem as per PW4, (the doctor), the victim had mental problems. His ability in the given circumstances to identify things properly was impaired. The victim himself testified to have been drinking before the incident took place suggesting he was already intoxicated. All these might have blurred his thinking and seeing capability to conclude, it was only the appellants and nobody else that had sexually abused him.

In the case of **Anthony Kigodi .V. Republic, Criminal Appeal No. 94 of 2005 (unreported)** the Court of Appeal stated: -

> *"We are aware of the cardinal principle laid down by the Court of Appeal of Eastern Africa in Abdullah bin Wendo and another vs. REX (1953) 20 EACA 116 and followed by this Court in the celebrated case of Waziri Amani vs. Republic (1980) TLR 250 regarding evidence of visual identification, no Court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the evidence before it is absolutely water tight"*

In the case of **Waziri Amani V Republic [1980] 250** the Court of Appeal laid down conditions to be considered when assessing the issue of identification that: -

> *"The principle of identification is that, where a witness is testifying about identifying another person in unfavorable circumstances like during the night. He must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light and its intensity, the length of time the person being identified was within view and whether the person is familiar or a stranger".*

Be as it may according to the evidence on record the incident was sudden and unexpected, the victim grabbed, undressed and sodomized. Considering his intoxicated mind and mental status, together with the sudden act, under such circumstances, the identification of the appellants was therefore not favourable. It is unfortunate that the case revolved solely on the evidence of the victim (PW1), which in

the circumstances was insufficient and the court needed to warn itself. In **Abdullah Bin Wendo vs Republic (1953) 20 EACA 166** it was stated there is always the need of testing with greatest care the evidence of a single witness in respect of identification.

From the foregoing, as conceded by the respondent, the case against the appellants was not proved at the required standard. I hereby allow the appeal, the conviction entered against the appellants is quashed and sentences set aside. The appellants are to be released from custody forthwith unless held for a lawful cause.

It is so ordered.

B. R. MUTUNGI
JUDGE
25/8/2021

Judgment read this day of 25/08/2021 in presence of all appellants and Miss Grace Kabu (S.A) for the respondent.

B. R. MUTUNGI
JUDGE
25/8/2021

RIGHT OF APPEAL EXPLAINED.

B. R. MUTUNGI
JUDGE
25/8/2021