IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL CASE NO. 169 OF 2020

(Original from the District Court of Kyela District, at Kyela, in Criminal Case No. 216 of 2019)

AMBAKISYE ARON.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 12.07.2021

Date of Judgment: 13.09.2021

Ebrahim, J.

A disciplined and civilized society is measured by how it cares for its elderly people. Young and energetic persons are encouraged to promote and participate in that function. The situation was different in Ikimba village, Kyela District and Mbeya Region where it was alleged that on 08/12/2019 during night hours AMBAKISYE ARON, (the Appellant) unlawfully had carnal knowledge of Halness Kabana (victim), an older woman aged at

85 years. It was further alleged that the appellant penetrated in both of the victim's private orifice leaving her unconscious.

Before the District Court of Kyela District, at Kyela in Criminal case No. 216 of 2019, the appellant was charged with two counts of sexual offences. First count was unnatural offence contrary to **section 154 (1) (a) of the penal Code, Cap. 16 R.E. 2019** and the second count was rape contrary to **sections 130 (1) and (2) (a) and 131 (1)** of the same law. The appellant pleaded not guilty to both counts. The case went to a full trial, the prosecution lined up six witnesses and tendered one document i.e PF3 (exhibit EH 1). In turn the appellant fended himself and called no witness. At the end of the trial, he was convicted of both counts and sentenced to serve a term of 30 years imprisonment in each count. The sentences were ordered to run concurrently. The appellant was also sentenced to caned be four strokes at the time of entering into the prison, and four strokes at the time of exist. He was further ordered to pay compensation to the victim at the tune of Tshs. 2,000,000/=. Aggrieved he appealed to this court challenging both the conviction and sentences.

In his petition of appeal the appellant preferred seven grounds of appeal which however can be smoothly condensed into two as follows:

1. That the District Court erred in law and fact when it convicted him while the prosecution failed to prove the case at the required standard.
2. That the District Court erred in law and fact when it failed to consider defence evidence on account that there was a land conflict.

In fact, the first improvised ground of appeal was constituted by two complaints that; the appellant was not identified since the incidence occurred at night time, and that there was contradictory evidence on part of the prosecution witnesses regarding how he was arrested and on the exactly time of the occurrence of the incidence.

Basing on these grounds of appeal, the appellant prayed for this court to allow the appeal, quash the conviction, set aside the sentence and set him free.

When the appeal was called for hearing, the appellant appeared in person, unrepresented vide virtual court while in Songwe prison. The respondent/Republic appeared through Ms. Xaveria Makombe, learned State Attorney who was physically present in court. The appellant prayed for the State Attorney to begin while reserving his right for rejoinder.

Responding, Ms. Makombe opposed the appeal, she started with the complaint of the appellant that he was not identified since the offence occurred during night time. She contended that before the trial court there was no issue of identification rather the appellant was recognized by the victim who testified as PW1. PW1 recognized him by the aid of the right of the lamp (kibatari). The victim is the aunt of the appellant thus she knew him well before and the appellant admitted on that account during preliminary hearing.

The learned State Attorney also contended that the appellant was recognize by PW2, PW3 and PW4. That PW2 heard PW1 crying in her house. He arrived at the crime scene found the appellant inside the house of the victim and he responded when PW2 called PW1. PW2 raised alarm for help where PW3 and PW4

responded to the alarm by also arriving to the scene. The appellant opened the door from inside, threatened to kill them and escaped. All witnesses knew the appellant before since he was familiar to them as they lived in the same village. To differentiate recognition of a familiar person from identification of a stranger, the learned State Attorney cited the case of **Charles Nanati v. Republic, Criminal Appeal No. 286 of 2017 Court of Appeal of Tanzania, at Dar es Salaam** (unreported).

Regarding the complaint by the appellant that there was contradiction prosecution witnesses in evidence Ms. Makombe argued that there was no contradiction since all witnesses testified that the incidence occurred on 08/12/2019 at night. All witness testified how the appellant escaped from the scene and Pw2 and Pw3 testified to have arrested the appellant who was found hiding at the side of the river.

On the complaint that his defence evidence on the land conflict was not considered; Ms. Makombe submitted that, the same was considered but it was rejected by the trial court on the ground that it was an afterthought because the appellant did not raise it during cross examination. The Appellant did not also

specify how the alleged conflict related to the offence he was charged and convicted with. To substantiate her argument that the defence was an afterthought she cited the case of **Martin Misara v. Republic. Criminal Appeal No. 428 of 2016, CAT at Mbeya** (unreported). Ms. Makombe thus, urged this court to dismiss the appeal.

In his rejoinder, the appellant prayed to adopt the contents of his grounds of appeal and he prayed for this court to consider them.

I have considered the grounds of appeal and the submissions by the learned State Attorney. In determining this appeal, I will go through the ground of appeal as improvised above and as argued by the State Attorney for the respondent. Therefore, the first issue is whether the prosecution proved the case at the required standard i.e beyond reasonable doubt. On that issue, there are two sub-issues which are; **firstly,** whether the appellant was positively identified or recognized, **secondly,** whether there were contradictions in the evidence adduced by the prosecution witnesses.

Starting with the first sub-issue above, it should be noted earlier that the appellant was convicted basing on the evidence of six witnesses whom four of them (i.e PW1, PW2, PW3 and PW4) were eye witnesses. In its judgment the District Court categorically stated at page 7 of the typed judgement that:

> *"The accused was found at the scene of the crime by PW2 and PW3 and other neighbours who are familiar to him and he talked to them before he escaped. There is no issue of mistaken identity in that regard."*

The appellant complained that since the incidence occurred at night time visual identification was unreliable. It is my belief that the appellant in formulation of the grounds of appeal had in mind the principle that, the evidence of visual identification is one of the weakest kind and thus, before it is taken as a basis of conviction, it must be watertight. The CAT in the case of **Waziri Amani v. Republic [1980] TLR 250** held that:

> *"(i) Evidence of visual identification is of the weakest kind and most unreliable;*

(ii) No court should act on evidence of visual identification unless all possibilities of mistake identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."

Equally, in a number of decisions like in the cases of **Raymond Francis v. Republic** [1994] TLR 100; **Emmanuel Luka and Others v. Republic,** Criminal Appeal No. 325 of 2010 **Ramadhani Vincent v. Republic**, Criminal Appeal No. 240 of 2009 **Emmanuel Mdendemi v. Republic**, Criminal Appeal No. 16 of 2007 (all unreported). The Court of Appeal of Tanzania laid down some guidelines to be considered so as to establish whether identification was water-tight. It includes the duration the witness had with the appellant under observation, the distance at which he made the observation, the time the offence was committed and in the event it was night time, if the lighting was sufficient for a positive identification and lastly, whether the witness knew or had seen the accused before the incident. The same guidelines apply in cases of recognition.

In the matter under consideration, the evidence on record adduced before the District Court can be recounted as follows:

the victim who testified as PW1 said that, she resides alone in her house. On the fateful night when lying on her bed the appellant entered her house through the window and she recognized him by the assist of the lamp light. The appellant forcefully undressed her underpants, tightened her neck and ravished her. He started by penetrating her in the vagina and later in her anus. She lost conscious and she found herself at Kyela Hospital. When she was cross-examined, PW1 replied that she saw the appellant entering her house at the midnight.

PW2 who said he was neighbour to the victim's house, testified that on the fateful night at 00:15 hours when he came from watching football match he heard dogs barking and heard the victim crying. Together with his mother went to the house of the victim. They both called the victim but she did not respond. They only heard the appellant who responded in Swahili language *"mmekuja kufanya nini wakati mimi nimekuja kulala na shangazi"* which can be translated as why are you here while I have come to sleep *with my aunt*. The appellant later opened the door from inside where there was a lamp light. The appellant threatened to injure them. PW2 and his mother raised the alarm and many

neighbours gathered at the scene. Afterwards, the appellant escaped. PW2 and other people mounted a search and found him hiding at the side of the river. Later, they took him to the police station. On cross examination PW2, replied that the appellant was wearing a short and a yellow T-shirt.

PW3 also the neighbour to the victim's house testified that, on the fateful night he was awakened by noises from the victim's house. He went to the scene and found PW2 and his mother. He also found the appellant whom he knew well for a long time since he (appellant) was born in that area. PW3 further testified that the appellant at the fateful night was wearing a short and a yellow T-shirt and he was threatening to kill PW2 and his mother. He later escaped. On cross examination PW3 replied that the appellant was found sleeping at the side of the river.

PW4 testified similar to what was testified by PW2 and PW3, only that he did not talk about the attire and where the appellant was found.

From the testimony of the victim and PW2 who told about the light of the lamp inside the victim's house, no other witness testified about the light at scene of the crime nor the available

condition outside the house i.e whether it was dark or there was moonlight. Nevertheless, the evidence on the light of a lamp was not denied or contradicted. Yet, all three eye witnesses i.e PW2, PW3 and PW4 testified on the fact that the appellant was living in the same hamlet since his childhood hence they knew him well. Also, PW2 and PW3 ascribed the attire of the appellant at that fateful night and they conversed with him as he threatened to kill them. Furthermore, PW2 and PW3 testified that they searched for him and found him hiding at the side of the river.

Again, it is on record that the appellant did not question the witnesses on the conducts like threatening them or questioning PW3 on the attire after the witness I testimony to that effect. The appellant did not also question about the said light of the lamp. It is a trite law that failure to cross-examine a witness on an important fact is deemed to be acceptance of the fact and the party shall be estopped from asking the trial court to disbelieve what the witness said: see the cases of **Damian Ruhele v. Republic,** Criminal Appeal No. 501 of 2007 CAT, **Nyerere Nyague v. R, Criminal Appeal No. 67 of 2010- CAT** (both unreported).

In that regard, this court infers the following facts: that in the victim's house there was light of a lamp; there was a conversation among the appellant, PW2 and PW3; the appellant was familiar as he resided in the same hamlet known as Mbako; the appellant wore a short and yellowish T-shirt on the fateful night; and he was arrested hiding at the side of the river. More - so, that all eye witnesses were believed by the trial court to be credible and their evidence was watertight. I have no cogent reasons to believe otherwise.

I am fortified by the holding in the case of **Jaribu Abdalla v. Republic, Criminal Appeal No. 220 of 1994** (unreported) which was cited in the case of **Oscar Mkondya & Others v. DPP, Criminal Appeal No. 505 of 2017, CAT at Mbeya,** (unreported) where it was held that:

> *".....in matters of identification it is not enough merely to look at the factors favoring accurate identification. Equally important* ***is the credibility of witnesses****. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence...."*
>
> (bold emphasis is mine).

Before concluding on the sub-issue under consideration, I am also convinced by the learned State Attorney regarding an observation made by the CAT in the case of **Charles Nanati** (supra) where the CAT quoted with approval the decision of the Court of Appeal of Kenya in the case of **Kenga Chea Tyoya v. Republic, Criminal Appeal No. 375 of 2006** (unreported) that:

> *"on our own re-evaluation of the evidence, we find this to be a straight forward case in which the appellant was recognized by witness Pw1 who knew him. This was clearly a case of* ***recognition rather than identification*** *and it has been observed severally by this court,* ***recognition is more satisfactory more assuring and more reliable than that identification of a stranger.***"(bold emphasis is mine)

In relation to the case at hand, I concur with the learned State Attorney for the respondent that the appellant was clearly recognized rather than identified. This was so because he was not stranger to the witnesses and the witnesses took an immediate action in making sure that he was apprehended. That is why the appellant was searched on the same day and arrested in the

morning of 09/12/2019 when he was hiding at the side of the river. Also see the case of **Marwa Wangiti Mwita and Another v. Republic, Criminal Appeal No. 6 of 1995** (unreported) where the CAT held that:

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability"*

From the above observations, I am firm that the appellant was positively recognized as the ravisher of the victim. Thus, the complaint that visual identification was unreliable has no merit.

Going to the second sub-issue of whether there were contradictions in the evidence adduced by the prosecution witnesses. The appellant complained that there was contradiction of evidence on when and how the witness saw him escaping in the dark. He also complained that evidence on why and how he was arrested was contradicting, and further that the day and time of the incidence was also inconsistent. On her party, the learned State Attorney for the respondent argued that there was no any contradiction since the charge sheet and the evidence showed that the incidence occurred during the night on 08/12/2019. She

also argued that the evidence that the appellant was arrested at the side of the river was not contradicted.

Indeed, I have thoroughly gone through the evidence, especially the one adduced by PW2 and PW3 regarding the arrest of the appellant, I did not notice any contradiction since both witnesses testified that after the incidence, the victim was taken to the hospital while she was unconscious and they searched for the appellant and found him at the side of the river. The only discrepancy is that PW2 said they found him hiding while PW3 said that they found him sleeping. Whatever the case, whether he was hiding or sleeping the fact is that the appellant was arrested soon after the incident at the side of the river. This is also substantiated by the appellant himself during preliminary hearing where he admitted to have been arrested after the incident.

Nevertheless, in his defence though on a different story, the appellant said that he was arrested on 09/12/2019 while the incident occurred at the night of 08/12/2019 according to the record.

As to the time and day of the incident, there is also no discrepancy since the evidence on record and the charge sheet

shows that it was on 08/12/2019 during night time. Again, I gather the spirit from the case of **Masanja Mazambi v. Republic [1991] TLR 200** where it held that minor variations in evidence are unavoidable since a witness is not rehearsed before testifying. I therefore find that there was no any contradiction in the evidence adduced by the prosecution witnesses.

Given the above findings the main issue on the first ground of appeal is answered positively that the prosecution proved their case beyond reasonable doubt. Thus, I dismiss the first ground of appeal for lack of merits.

The following issue now, is whether the defence evidence was considered by the District Court. As rightly argued by the learned State Attorney for the respondent, the evidence of the appellant was considered but was rejected as it was an afterthought. The averment by the appellant that it should have been considered that there was a land conflict, is not tenable. This is because, in his evidence the appellant did not state clearly about who was involved in the conflict and how is the same related to the victim as there is undisputed fact that the victim is an aunt of the appellant. For easy reference I quote in verbatim

the defence evidence as it appears at page 23 of the typed proceedings.

> "On 09/12/2019 I was in my farm at 9:00 hrs I saw 4 people coming who are my relatives I thought they are coming to assist cultivating. One of them asked me why I am cultivating that farm. He said I have exceeded the boundary. The other side "we have no need ask him". they started assaulting me and then they left. I waked up and started to go to the police station to report the matter, I met with a police officer on the was who took me to hospital I was attended at hospital. When I recovered they told me I raped the victim and they sent me to police station. But I denied that I didn't rape any person, they sent me to this court."

I have in mind the requirement of proof in criminal cases that, it is not a duty of the accused to prove his/her innocence, but to cast a doubt to the evidence adduced by the prosecution side see the case of **Mohamed Said Matula v. Republic [1995] TLR 3**. However, in the instant case looking at the defence evidence, a scincilla it did not cast a shadow of doubt to prosecution evidence.

Under the circumstances, the District Court, as a trial court considered defence evidence. Owing to the above reasons, I hereby dismiss the entire appeal for lack of merits.

Ordered accordingly.

R.A. Ebrahim

Judge

Mbeya

13.09.2021