IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPELA NO. 44 OF 2020

(C/F Criminal case No. 51 of 2015, in the District Court of Mbulu at Mbulu)

FRANCIS PETRO.....APPELLANT

VERSUS

THE D.P.P.....RESPONDENT

JUDGMENT

13/10/2021 & 19/01/2022

GWAE, J

In the District Court of Mbulu (trial court) the appellant, Francis Petro was charged with, tried and convicted of the offence of rape c/s 130 (2) (e) and 131 (i) of the Penal Code, Chapter 16 of Revised Edition, 2002. He was sentenced to the terms of thirty (30) years imprisonment.

It was alleged by the Prosecution side that on the date of 10th May 2015 at about 16:00 hrs at Getanyamba village within Mbulu District in Mnyara Region the appellant did have carnal knowledge with a girl aged 13 years old whose name shall be referred to as CN (victim), the act which is in contravention the law.

Briefly, the prosecution evidence that led to the full satisfaction of the trial court that, the charge against the appellant was proved to the required standard is as follows; that on the material date the victim, CN as she was coming from Hyadom where she was selling eggs, on her way back home she met the appellant who held her neck and on his other hand he held bush knife. He then threw her down, removed her clothes, took his penis and inserted it into the victim's vagina. The victim tried to raise an alarm but she was warned by the appellant not to do so by threatening to kill her by the knife which he was holding. The appellant had sex with the victim and after he had ejaculated, he took the money that the victim had and he departed off.

The victim went back home and informed her mother, she was on the same day taken to Haydom Hospital for medical checkup. According to the testimony of PW4, the victim was medically examined and she was found to have blood into her vagina and inside her vagina there was steer cut at the right side diagnosed to have beeb caused by a blunt object like penis nevertheless no hymen was found.

On the 22nd May 2015 the appellant was arrested and taken to the village office, the victim was called for identification, according to the victim

the appellant was placed in a group of people and she was told to point out who had raped her, she was able to identify the appellant on reasons that he had marks/gash (chale) on his face, the clothes he was wearing were the same he wore on the date of the incident. PW3 the VEO of the Getayamba village interrogated the appellant and recorded his statement (PE1) where the appellant is said to have admitted the offence. Later on, the appellant was taken to Hydom Police Station.

During his defence, the appellant who stood as DW1, patently denied the accusations by stating that on the material date he was at Hanang' market and that, he was not in the place where he is alleged to have committed the sexual offence to the victim. He further stated that, none of the prosecution witnesses identified him except the VEO of the Getanyamba village.

Following the trial court's verdict, the appellant felt aggrieved by both conviction and the imposed sentence. He is now before this court challenging the conviction and sentence on the following grounds;

1. That, the trial Magistrate erred in law and in fact in holding that the appellant was properly identified at the scene of crime. The

appellant was not previously known to PW1 her claim that he saw the appellant at the scene of crime was essentially dock identification and the dock identification of the appellant was not preceded by an identification parade.

2. That, the trial Magistrate erred in law and in fact by relying on exhibits P1 and P2 contrary to the law.
3. That, the trial Magistrate erred in law and in fact in holding that the evidence tendered by the prosecution witnesses proved the charge laid against the appellant beyond reasonable doubts.

During the hearing of this appeal, the appellant appeared in person unpresented whereas the Respondent, the Republic was duly represented by Ms. Alice Mtenga, the learned State Attorney.

Arguing in support of his appeal, the appellant submitted that; **firstly,** that, his purported identification was so weak and not legally founded as the victim was not familiar with him prior to the occurrence of the incident. According to the appellant, an identification parade was therefore required to be conducted. He added that, the identification done by the villagers was unprocedural and what was required to be done was to conduct a formal identification parade and **secondly**, that, the appellant submitted that

exhibits PE1 and PE2 were not read over to him for him to enable him know the contents. Dure that omission, it was therefore his prayer that the said exhibits be expunged from the records.

Opposing this appeal, Ms. Mtenga argued as follows; **firstly,** that, the appellant was properly identified by the victim as it was day hours (16:00 hrs) and **secondly**, that, the appellant was re-identified by the victim at the village office.

As to the second ground of appeal, the Ms. Mtenga conceded with the appellant's arguments that the exhibits admitted by the trial court be expunged from the records however the learned State Attorney was of the opinion that, the evidence of the medical practitioner was still enough to secure conviction on the ground that, there was ample evidence which proved that the offence was committed and more so, even the elements necessary were proved.

In his short rejoinder, the appellant insisted on his identification that he is not black nor does he have special marks (chale) on his face as alleged by the prosecution.

Having briefly explained what transpired before the trial court and this court on appeal, I should now determine appellant's grounds of appeal as follows;

Starting with **1st ground on the complaint as to identification of the appellant**. It is always imperative to conduct a parade of identification in case the one allegedly identified and identifying person did not know each other prior to the incidence as opposed to those who were familiar to each other before an occurrence of a crime. The essence of conducting parade of identification is to give assurance regarding the alleged identification (See the case of **Waziri Amani vs Republic** [1980] 250.

In our case, the appellant is said to have been identified by the victim at the village office and he was identified in a group of people. The power to conduct of an identification parade is provided by the provisions of section 60 of the Criminal Procedure Act, Chapter 20, Revised Edition, 2019, which bears similar wording with the provisions of section 38 of the Police Force and Auxiliary Services Act, Chapter 322, Revised Edition, 2002, which reads:

> "Any police officer in-charge of any Police Station or any police officer investigating an offence may hold an identification parade for the purpose of ascertaining

whether a witness can identify a person suspected of the commission of any offence."

In conducting identification parade there are rules which need to be observed, there are 13 rules however I need not reproduce all of them they actually have the origin from the case of **Rex vs. Mwango Manaa** (1936) EACA 29 among others are;

i. The accused person is always informed that he may have a solicitor or friend present when the parade takes place

ii. At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply."

In the instant case, it is apparently clear that, the identification of the appellant was done informally as there is no evidence to the effect that a formal identification parade was conducted and supervised by police. That being the case, it is my decided view that, there was non-compliance with the procedural law required in conducting identification parade as in the absence of clear evidence as to familiarity between the victim and the accused now appellant, a formal and proper identification parade was therefore obligatory, the victim ought to have mentioned the appellant by

his name if she knew him prior to the occurrence and if not in affirmative, she ought to have described the appellant's features which were to be repeated to police when she was making a first report as well as during trial (See **in Omari Iddi Mbezi and 3 Others versus Republic,** Criminal Appeal No. 227 of 2009 (unreported-CAT).

According to the scanty evidence the evidence adduced by the prosecution witnesses in respect of the alleged identification of the appellant, in my considered view, there was requirement of having other corroborative pieces of evidence in order to safely secure a conviction against the appellant. This ground is therefore allowed.

Coming to the **second ground of appeal** herein above, as correctly conceded by the learned State Attorney, the records are so clear that exhibits P1 and P2 being appellant's cautioned statement and PF3 respectively, after they were admitted by the trial court the same were not read out in court. The necessity for documents which have been admitted by the trial court to be read over has been stressed in a numerous courts' decisions including the decision of the Court of Appeal of Tanzania in **Robert P. Mayunga & another vs. The Republic,** Criminal Appeal No. 514 of 2016 (Unreported), in this case the Court of Appeal stressed that, any document after its

admission must be read over to the appellant so that the appellant may be aware of the contents and can properly exercise his right to cross-examine the witness effectively. As suggested by both parties, PE1 and PE2 are accordingly expunged from the records.

The last question for my determination is, **whether the trial court justly and fairly held that the prosecution evidence was water tight justifying conviction against the appellant.**

It is trite law that, in a criminal trial, the burden of proof lies on the prosecution shoulders, it therefore never shifts to an accused person. From the foregoing analysis of evidence, the noted short falls such as improper identification of the appellant taking into account lapse of time since the appellant was arrested on the 22nd May 2015 whereas the incident occurred on the 10th May 2015. I am alive of the principle that an accused person charged with an offence of rape may be convicted of that offence notwithstanding rejection of a PF3 during trial or it be expunged on appeal provided that the oral evidence is water tight however in our present criminal case the evidence against the appellant is so doubtful especially omission to conduct formal parade of identification. The omission goes to the root of the case as it is too risky to secure conviction in those circumstances.

In the event I find this appeal is not without merit, it is allowed and I proceed quashing the trial court's conviction and setting aside the sentence meted against the appellant. The appellant shall be released from the prison forthwith unless held therein for other lawful cause.

It is so ordered.

M. R. GWAE
JUDGE
19/01/2022