IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
(AT DAR ES SALAAM)

CRIMINAL APPEAL NO 155 OF 2021

(Originating from the Decision the District Court of Kisarawe at Kisarawe in Criminal Case No. 31 of 2018)

YAHAYA RAYMOND.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 9/3/2022
Date of judgment 23/3/2022

MASABO, J.:-

Yahya Raymond, the appellant herein was arraigned before the district court of Kisarawe at Kisarawe where he was jointly charged with one Yusuph Mwaluko (the 2nd accussed) for gang rape contrary to section 131A(1) of the Penal Code [Cap 16 RE 2019]. It was alleged that at around midnight on 31st May 2017, the accussed persons unlawfully had carnal knowledge of the victim without her consent. On that material date and time, the victim was selling liquor at a grocery owned by her sister. At around midnight they heard that policemen were coming to the grocery. Frightened by this unexpected visit, they started to run away. The victim fled the area in the company of one said Yusuph Mwaluko (the 2nd accussed in the trial court) who promised to take her to a safe hiding place at a nearby house. On arrival, they found the appellant herein. Strangely, the atmosphere drastically changed. Instead

of being a safe hiding place it turned into a crime scene. The said Yusuph Mwaluko grabbed her and raped her with the assistance of the appellant who was tightening her mouth and inserting fingers in her anus and upon finishing, the appellant also took turn and raped her. Five witnesses testified in support of the prosecution's case and at the end of the trial, the court found the case against both accused persons to have been proved beyond reasonable doubt. The appellant was convicted and condemned to 30 years imprisonment.

The appellant is aggrieved by the conviction and sentence hence this appeal in which he has fronted a total of 9 grounds of appeal which I will summaries as follows: *one,* the charge sheet was defective; *two,* penetration was not established; *three,* the victim did not accurately establish the role played by the appellant in the commission of the offence; *four*, PW1 and PW4 contradicted materially as to told the victim to go to the hiding place; *five,* the accussed was not properly identified as there was no identification parade; *six*, Exhibit PE1 was improperly admitted as it was not read out after admission; *seven*, the prosecution did not lead evidence as to how he was apprehended; *eight*, prosecution evidence was unjustified and uncorroborated; and *last,* the prosecution did not prove its case beyond reasonable doubt.

During the *viva voice* hearing, the appellant who was lay and unrepresented, had nothing to add to his grounds of appeal. He just expressed his confidence that the court will fairly determine his appeal.

For the Respondent, Ms. Laura Kimario, learned State attorney, supported the conviction and sentence. Submitting on the 1st ground of appeal, she conceded that there is an anomaly in the charge sheet as the provision creating the offence was partially cited in that the charge sheet cited section 131A(1)and omitted to cite subsection (2)(a) of the Penal Code. She however argued that the defect is curable under section 388 of the Criminal Procedure Act [Cap 20 RE 2019] as the particulars in the charge sheet were very explicit and the testimony of PW1 sufficiently disclosed the nature of the offence committed by the appellant. Thus, the appellant knew the nature and gravity of the offence and was able to defend himself. In support of this submission, she cited the case of ***Jamal Ally v. R.,*** Criminal Appeal No 52 of 2017 (unreported) where it was held that, such a defect is curable.

On the 2nd and 3rd ground of appeal, she argued that they are devoid of merit as the victim clearly narrated how she was penetrated by the appellant and his co accussed and how the accussed abetted by tightening her mouth. Thus, penetration and the role prayed by the appellant were all proved. Regarding the 4th ground of appeal, it was submitted that there was no any material contradiction in the prosecution witnesses. She argued that the evidence of PW5, the doctor who examined PW1, corroborated the allegation that the victim was raped as in her examination she observed that the victim had bruises in the vagina and anus. Regarding identification, it was submitted that the appellant was positively identified through electricity. Thus, there was no any chance of mistaken identity. On the admissibility the PF3, the learned State Attorney conceded that the proceedings are silent on

whether it was read over. She however argued that, even if this evidences is expunged from the record, it will have no greater impact as the evidence tendered by the doctor is intact. On the 9th ground of appeal, the learned state Attorney argued that the appellant was arrested at the scene. Lastly, she argued that the case against the appellant was proved with no flicker of doubt. Thus, the appeal is without any merit. This marks the end of the submission.

I have considered the submission and the lower court records. Starting with the first ground of appeal which has been conceded by the learned State Attorney, the anomaly is crystal clear on record. As per the charge sheet dated 1/6/2018, the appellant and his co accused were charged of gang rape contrary to section 131A (1) of the Penal Code [Cap 16 RE 2002 which states that:

> **131A**.-(1) Where the offence of rape is committed by one or more persons in a group of persons, each person in the group committing or abetting the commission of the offence is deemed to have committed gang rape**.**

Admittedly, this provision is not self-sustaining as it only creates an offence without prescribing the sentence. Thus, it has to be read conjointly with subsection (2) of the same Act which provides that:

> (2) Subject to provision of subsection (3), every person who is convicted to gang rape shall be sentenced to imprisonment for life, regardless of the actual role he played in the rape.

As there is no dispute about the anomaly, the only question exercising my mind is whether the anomaly is fatal hence incurable under section 388 of the Criminal Procedure Act [Cap 20 R.E. 2019]. The learned state Attorney has submitted in the negative arguing that much as there was a defect, the charge sheet was explicit on the nature of the offence committed and the evidence rendered in court sufficiently described how the offence was committed. She fortified her submission with the case of **Kubaja Omry v R** (supra). Upon consulting this case and other authorities, I see no need to belabor much on this point as the law is fairly settled that in dealing with a similar issue, the court should critically examine the charge sheet and the evidence rendered by the prosecution to see whether the information divulged is articulate and sufficiently enabled the accussed to appreciate the nature and the seriousness of the offence he stood charged. An affirmative answer to this question entails that the defect is non-fatal hence curable under section 388 of the CPA. Dealing with a similar issue in ***Jamal Ally v. R.,*** Criminal Appeal No 52 of 2017 (unreported), the Court of Appeal emphatically stated thus:

> It is our finding that the particulars of the offence of rape facing the appellant, together with the evidence of the victim (PW1) enabled him to appreciate the seriousness of the offence facing him and eliminated all possible prejudices. Hence we are prepared to conclude that the irregularities over non-citations and citations of inapplicable provisions in the statement of the offence are curable under section 388(1) of the CPA."

Cementing this position in **Kubaja Omary vs Republic** (supra) the Court stated thus:

> The appellant would want us make a mountain out of a molehill but we are confident that we cannot go along with him because the error complained of did not vitiate the charge. As rightly submitted by Ms. Lucas placing reliance from our previous decisions in **Festo Domician and Jamal Ally** (supra), the error is one which is curable under section 388 (1) of the CPA. This is more so because despite the error in the section creating the offence, the particulars of the offence were very clear that the appellant was alleged to have committed rape to a named adult woman of 67 years of age to which he pleaded not guilty. In addition, the appellant knew the victim, had an opportunity to cross examine her and later on he defended himself. Under the circumstances, it is hard to appreciate in what way the appellant was prejudiced by the error in citing the relevant paragraph in the section creating the offence.

The record in the present case show that the particulars of the offence were very clear that the accussed together with the Said Yusuph Mwaluko gang raped the victim who is an adult woman without her consent. This, together with the articulate evidence of PW1, PW2, PW3, PW4 and PW5 and other prosecution witnesses divulged all the necessary information to enable the appellant to appreciate the seriousness of the offence he stood charged. It is also clear from his defence that he understood the nature and gravity of offence and since no prejudice has been demonstrated to have been occasioned, I too, just like the Court of Appeal in **Kubaja Omary vs**

Republic (supra) refrain from making a mountain out of a molehill and I hereby dismiss this ground of appeal.

The remaining grounds of appeal point to two main issues the *first* one being whether the offence of gang rape was proved and *second*, whether the evidence on record implicated the appellant. Starting with the first issue, Section 131A (1), (2) and (3) of the Penal Code, under which the appellant was convicted states:

> (1) Where the offence of rape is committed by one or more persons in a group of persons, each person in the group committing or abetting the commission of the offence is deemed to have committed gang rape.
> (2) Subject to the provisions of subsection (3), every person who is convicted of gang rape shall be sentenced to imprisonment for life, regardless of the actual role he played in the rape.
> (3) Where the commission or abetting the commission of a gang rape involves a person of or under the age of eighteen years the court, shall in liue of sentence of imprisonment, impose a sentence of corporal punishment based on the actual role played in the rape

Interpreting this provision, the Court of Appeal in **Imani Charles Chimamngo vs Republic**, Criminal Appeal No. 382 of 2016 stated thus:

> .... the offence of "gang rape" is an aggravated specie of the offence of rape. The phrase "Where the offence of rape is committed" appearing at the very beginning of sub-section (1) of section 131A pre-suppose that in gang rape, the prosecution must also prove that offence of rape in any of its various descriptions under section 130 has been committed. Unlike the

> offence of rape under section 130, the phrase: "is committed by one or more persons in a group of persons, each person in the group committing or abetting the commission of the offence' appearing in sub-section (1) of section 131A aggravates the committed offence of rape to that of gang rape like what pertains in the offence of rape under section 130 where the prosecution must establish both lack of consent and penetration; lack of consent and penetration must similarly be proved in gang rape under section 131A. In gang rape, evidence must in addition prove the role of another person or other persons abetting or assisting in the commission of the rape. Again, the prosecution need not prove that each member of the group achieved any penetration for the offence to be committed. Penetration by one member of the group, facilitated by another or others, will be sufficient to ground a conviction.

The principle/s emerging from this authority can be summarized as follow: **First,** the offence of gang rape being an aggravated specie of rape is established where there is proof of rape. To secure a conviction the prosecution must first establish that there was penetration and where the victim is an adult woman as in the instant case, proof that the penetration was without the consent of the victim. **Second,** the prosecution must establish that the offence was committed by one or more persons each of whom must have prayed a certain role. ***Third***, the role so prayed must not necessarily be penetration. Penetration by one member of the group, is sufficient to ground a conviction against the accomplices.

Having assessed the evidence on record, I have observed that, page 5 of the word-processed trial court proceedings shows that the prosecutrix who

testified as PW1 graphically described both, penetration and lack of consent. She ably narrated how the appellant and his co accussed penetrated her without her consent and in particular, how upon entry into the appellant's house the second accussed penetrated her while the appellant herein was abetting by tightening her month and inserting fingers in her anus after he finished the appellant herein took turn by forcefully penetrating her while his accomplice was abetting by inserting fingers in her anus. Thus, apart from proof of penetration and lack of consent, it is crystal clear from her testimony that the commission of the offence involved two people and each of them prayed a dual role, that is penetration and abetting. As the evidence of the prosecutrix in sexual offences is regarded as the best evidence (**Seleman Maumba v Republic**, Criminal Appeal No. 94 of 1999 (unreported)), and since the evidence of PW1 who was the prosecutrix in the instant case was uncontroverted, I irresistibly find and hold that the offence of gang rape was proved. Consequently, the second ground of appeal vide which it has been complained that penetration was not established and the 3rd ground of appeal through which the appellant has lamented that the victim did not accurately establish the role played by the appellant are dismissed for want of substance.

I may add here that, the evidence of PW1 was corroborated by PW5, the doctor who examined the prosecutrix and found that she had bruises and sperms in her anus and vagina and thereafter filed a PF3 which was tendered and admitted as Exhibit. I understand that, in the sixth ground of appeal the appellant has lamented about the irregularities in the admission of the PF3

as exhibit and his major complaint is that, upon being admitted it was not read out contrary to the requirement of law. I will not allow myself to be detained by this point because even if was found be valid it will have no significant effect as the evidence of the prosecutrix which is the superior evidence is uncontroverted.

Regarding to the second question, for conviction and sentence against the accussed to be established, there must be evidence implicating him. If upon the assessment of evidence it is found that none of the evidence implicates the appellant, the conviction and sentence against him cannot be grounded/sustained. In the instant case, having assessed the evidence I have observed that the material evidence of implicating the appellant is the evidence of PW1. The appelant has complained in the 5th ground of appeal that he was not properly identified as there was no identification parade, He has also complained through the 7th ground of appeal that, the prosecution did not lead evidence as to how he was apprehended. I will outright overrule the complaint in ground number seven as the evidence PW3 ably demonstrated that the appellant and his accomplice were arrested by PW3 who was a cell leader being assisted by other people present at the scene.

Reverting to the 5th ground of appeal as regards identification, the law applicable in cases where the evidence incriminating the accused is overwhelmingly that of visual identification has been extensively tested and is fairly settled. As held by the Court of Appeal in **Mussa Hassan Barie & Albert Peter @ John** v R, Criminal Appeal No 292 of 2011 (unreported):

> The law on visual identification is, we think, now fairly settled. It is of the weakest kind, especially if the conditions of identification are unfavourable. So, no court should base a conviction on such evidence unless, the evidence is absolutely watertight. (See **Waziri Amani vs R** (*supra*).
>
> Although, no hard and fast rules can be laid down as to what constitute favourable conditions (as those would vary according to the circumstance of each case) factors such as whether or not it was day time or at night if at night, the type and intensity of light; the closeness of the encounter at the scene of crime; whether there were any obstructions to clear vision, whether or not the suspect(s) were known to the identifier previously; the time taken in the whole incident; and many others, have always featured in considering whether or not identification of suspects is favourable (See **WAZIRI AMANI vs R** (*supra*).

Since the evidence incriminating the appellant in the instant case was visual identification by the prosecutrix, it was crucial for the trial court to critically examine the evidence with the aid of the open list of factors above so as to satisfy itself that the conditions for identification were favourable and that all chances of mistaken identity were eliminated. Since the offence happened at midnight, one would have expected the prosecution to render evidence as to the nature and intensity of light, if any, that helped the prosecutrix to

identify the appellant. To the contrary, PW1 vaguely stated that she saw her assailants 'through electricity' without divulging any details as to the source/type of the said electricity and its intensity. The court was left to speculate. This was lucidly wrong as speculation is not the duty of the court. Court decisions are borne out of evidence and not speculations. The Court of Appeal was confronted with a similar situation in **Flano Alphonce Masalu @ Singu vs Republic,** Criminal Appeal 366 of 2018 (unreported). In that case, just like in the instant case, the victim vaguely stated that the lights were on without providing any specificity as to the actual source of light and its intensity. The court found that the possibility of a mistaken identification was not completely eliminated and the appeal was consequently allowed. The circumstances in the instant case attracts a similar conclusion.

My inclination towards this position owes also to the fact that as the records will reveal, it is not crystal clear whether the appellant herein was a stranger or known to the prosecutrix. In her testimony, she told the court that 'I know the 2nd accussed before and the 1st accussed when he was coming from inside and the people was asking him the reason for raping me..." Unfortunately, none of those people was called to corroborate the story. PW2 arrived at the scene after the incident. Her account was that, when she arrived at the scene, she found many people and the victim who was crying while half naked. Later on, the appellant and his accussed arrived and started to narrate the story. PW3 was similarly not present. He went to the scene later.

Having ruled that the identification was weak as the chances for mistaken identity were not completely ruled out and there being no other evidence incriminating the appellant, I find merit in this ground and I proceed to allow the appeal. It is subsequently ordered that the appellant be set at liberty unless otherwise lawfully held.

DATED at Dar es Salaam this 23rd day of March, 2022

X

Signed by: J.L.MASABO

J.MASABO

JUDGE