IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 51 OF 2021

Appeal from the Misc. Civil Application No. 46 of 2019 in the District Court of Chato at Chato (Mlashani, RM) dated 6th of February, 2020.)

HAMIS S/O COSMAS ..... 1ST APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

7th, & 28th June, 2021

ISMAIL, J.

The District Court of Chato at Chato convicted the appellant of rape, and sentenced him to a thirty-year prison term. Deducing from the record of the trial proceedings, it is informed that at 19.00 hours on 1st February, 2019, at Katale Village within Chato District in Geita Region, the appellant allegedly had a carnal knowledge of one XYZ (in pseudonym), a woman aged 55 years, without her consent. The appellant's alleged act was contrary to the provisions of section 130 (1) (2) (b) and 131 (1) of the Penal Code, Cap. 16 R.E. 2019.

The brief facts of this case are not hard to comprehend. The appellant and the victim (PW1) are both residents of Katale village in Chato District. In the evening of the fateful day, PW1 was allegedly walking back from the lake shore (Mwaloni). At about 1900 hours, PW1 noticed that the appellant was pursuing her. He then allegedly attacked her, beat her up and felled her down, while covering and her mouth, entered his genitalia into the appellant's private parts and raped the victim. As the appellant did that, he threatened the victim with death. When he was done, the appellant ran away.

PW1 reported the matter to the Ward Executive Officer who assured her that the appellant would be arrested the following day. True to the promise, the appellant was apprehended and conveyed to Chato Police Station when a PF3 (exhibit PE1) was issued to allow for her examination. The examination conducted by PW3 found that PW1's vagina had some bruises which suggested that she had been penetrated. PW3 concluded that PW1 had been raped. The appellant was then arraigned in court where he pleaded not guilty to the charge. The trial proceedings saw the prosecution bring on three witnesses against the appellant's sole defence witness. In his defence testimony, the contention was that he was not involved in the

offence with which he was charged, denying that he knew PW1, the victim. He urged the Court to do justice to him.

The appellant's defence did little to convince the trial magistrate who took the view that his culpability had been established. He convicted the appellant of rape and condemned him to a custodial sentence of 30 years. This decision has irked the appellant, hence his decision to institute the instant appeal. Eight grounds of appeal have been raised. These are: ***one***, that PW1's evidence was fabricated and lacking support that would make it trusted by a court to find the appellant guilty; ***two***, that the trial court failed to act on contradiction between PW1's testimony that was to the effect that the rape incident was reported to WEO and that the appellant was named as a suspect, and that of PW2 who alleged that the incident was reported to him and that the appellant was not mentioned as a suspect; ***three***, that the trial court erred when it concluded that the appellant was guilty while PW3's testimony was not cogent enough to prove that the bruises in the victim's genital organs was as a result of the rape incident committed by the appellant; ***four***, that PW1's evidence was incredible and unbelievable for not giving reasons for her failure to raise an alarm immediately after the rape incident; ***five***, that the appellant was convicted of rape while no police officer investigated the matter or testified in court; ***six***, that the trial court erred in

convicting the appellant based on an uncorroborated testimony of PW1, as the testimony of PW2 and PW3 was too suspect to corroborate PW1's testimony; ***seven***, that the testimony of PW1 was a mere afterthought which would not be relied on to convict, and that credibility of PW1 was not put to test; and, ***eight***, that since the appellant's conviction and sentence were based on hearsay evidence and that the case against him was proved beyond reasonable doubt.

Hearing of the appeal saw the appellant appear in person, unrepresented, whereas the respondent was represented by Ms. Ghati Mathayo, learned State Attorney. When the Court invited the appellant to address it, he chose to let the respondent submit first and let him come last. This proposal was acceded to by Ms. Mathayo.

The learned attorney began by stating that she was supporting the conviction and sentence passed by the trial court. With respect to grounds one and seven, the counsel's contention is that the prosecution's testimony was credible and a true account of what happened. Referring to page 8 of the proceedings, Ms. Mathayo contended that the testimony is clear on how PW1 knew the appellant, and the way he tracked and raped her. Ms. Mathayo further argued that the victim identified the appellant at the dock. She restated the established principle which is to the effect that in rape cases

the testimony of the victim is crucial and decisive. She referred the Court to the case of ***Selemani Makumba v. Republic*** [2006] TLR 384. Still on the testimony of PW1, the respondent's counsel argued that the appellant's failure to cross-examine her means that he admitted that what was stated by PW1 was true. It is why the court treated the testimony as credible and reliable. To aid her cause, she referred the Court to the case of ***Daniel Ruhele v. Republic***, CAT-Criminal Appeal No. 501 of 2007 (unreported).

With respect to ground two of the appeal, the respondent's submission is that the alleged contradictions are not of any fundamental effect, adding that such contradictions do not take away the fact that the appellant was the culprit. Ms. Mathayo argued that. at page 6 of the proceedings, the appellant admitted that he knew the victim. The learned attorney submitted further that not every contradiction goes to the root of the case unless it affects the central story. On this, she cited the decision of ***Mukami Wankyo v. Republic*** [1990] TLR 49. With respect to ground three, the respondent's contention is that, in rape cases, it is the victim's testimony that is decisive, and that, in this case, PW3's testimony was to the effect that she found bruises in the victim's vagina, arguing that such examination did not require PW3 telling who the perpetrator was.

With regards to ground four, Ms. Mathayo's argument is that the ground is baseless. She referred me to page 8 of the proceedings and argued that the victim was recorded as saying that the appellant threatened her with death but she reported the matter immediately after the incident. Submitting on ground five, the respondent took the view that this ground lacks any basis since, in terms of section 143 of the Evidence Act, Cap. 6 R.E. 2019, a party is not under any compulsion to bring any particular number of witnesses. The respondent's counsel contended that the appellant did not deny that he was arrested or interviewed. Referring to the decision in ***Goodluck Kyando v. Republic*** [2006] TLR 367, the counsel argued that what is important is the witnesses' credibility.

Regarding ground six of the appeal, Ms. Mathayo's argument is that in rape cases the victim's testimony is key and it does not require any corroboration.

In her submission on ground eight of the appeal, Ms. Mathayo argued that the case was proved beyond reasonable doubt, as the prosecution's testimony was strong and was not assailed by the appellant. The learned attorney argued that the victim's testimony was not a hearsay account. She castigated the appellant for employing no effort in exposing weaknesses in the prosecution's evidence. He urged the Court to dismiss the appeal.

The appellant did not have much to say. He argued that he was not involved in the offence he was charged with. It was the appellant's contention that his failure to mount a formidable defence was attributed to his ignorance. He urged the Court to allow the appeal.

From the submissions by the parties, the pertinent question for determination is whether this appeal carries any merit sufficient to allow appeal. For reasons that will be apparent, I will confine my analysis to ground eight of the appeal. The broad contention by the appellant in this ground is that the prosecution case was not proved beyond reasonable doubt. This contention has been discounted by the appellant. The basis for the contention is PW1's testimony that identified the appellant as the culprit of the rape incident. This means that conviction of the appellant was, by and large, based on the visual identification of PW1 who claimed that she identified the appellant at 19.00 hours, when the incident allegedly occurred.

It is a cherished position that visual identification can be the sole piece of evidence on which a conviction can based. The condition precedent, however, is that such evidence must be watertight, leaving no possibility of errors. This principle has gained a judicial recognition across jurisdictions, including some scholars of admirable renown. These include ***Elizabeth F. Loftus*** and ***Willian Polulos*** whose excerpts were reproduced in ***Republic***

v. Leonard Ndonde & Another, HC-Criminal Sessions Case No. 67 of 2016 (MZA-unreported).

In her article, Eyewitness Testimony 19 (1979), ***Elizabeth F. Loftus***, the learned author remarked:

> ***"The reasons as to why this kind of evidence has to be given great caution when the court intends to rely on, is that the basic foundation for eyewitness is a person's memory. And we often do not see things accurately in the first place, but even if we take in a reasonably accurate picture of some experience, does not necessarily stay perfectly intact in memory, sometimes the memory traces can actually undergo distortion with the passage of time, proper motivation interfering facts.*** *The memory traces seem sometimes to change or become transformed. These distortions can cause a human being to have memories of things that never happened. In* ***State of Utah v. Deon Lomax Clopten****, 223 P 3d 1103 (2009) 2009 UT 84:*
>
> *"the vagaries of eyewitness identification are well known; the annals of criminal law are rife with in instances of mistaken identification. Decades of study have established that eyewitnesses are prone to identifying the wrong person as the perpetrator of the crime where certain factors are present.* ***The most troubling dilemma regarding eyewitnesses stems from the possibility that an inaccurate***

> ***identification may be just as convincing to a jury as an accurate one.*** *As one leading researcher said: "[T]here is almost nothing more convincing than alive human being who takes the stand, points a finger at the defendant, and says: That's the one!"*[Emphasis added]

The foregoing excerpt is cemented by Willian Polulos, a Barrister, who urged a caution in the treatment of an eye witness identification. He opined as hereunder:

> *"Because of the dangers inherent in eyewitness testimony, eyewitness identification evidence is inherently unreliable. The Inherent frailties of eyewitness identification evidence are well – established and can lead to wrongful convictions, even in cases where multiple witnesses have identified the same accused."*

(See:http:/www.williampouloslaw.com/blog/uncategorized/eyewitnessidentification).

The two authors restated what is already an established position in our jurisdiction. Through the landmark decision in ***Waziri Amani v. Republic*** [1980] TLR 250, elaborate principles on identification and circumstances under which conviction may be grounded, based on identification, were set out. The message distilled from these principles is that conviction will only be grounded if identification is of the quality that is satisfactory, in the mould set out in ***Demeritus John @ Kajuli & Others v. Republic***, CAT-Criminal

Appeal No. 155 of 2013 (unreported). The Court of Appeal held in this case as follows:

> *"In a string of decisions, the Court has stated that evidence of visual identification is not only of the weakest kind, but it is also most unreliable and a Court should not act on it unless all possibilities of mistaken identity are eliminated and it is satisfied that the evidence before it is absolutely water-tight (See,* ***Waziri Amani v. R.*** *(1980) TLR 250;* ***Raymond Francis v. R.*** *(1994) T.L.R. 100;* ***R.V. Eria Sebatwo*** *(1960) EA 174;* ***Igola Iguna and Noni @ Dindai Mabina v. R.,*** *Criminal Appeal No. 34 of 2001, (CAT, unreported). Eye witness identification, even when wholly honest, may lead to the conviction of the innocent (****R. v. Forbes****, (2001) 1 ALL ER 686).* ***It is most essential for the court to examine closely whether or not the conditions of identification are favourable and to exclude all possibilities of mistaken identification."*** [Emphasis is added].

The test of the visual identification is much more stringent where the visual identification sought to be relied on was done at night. Utmost care is urged in such a situation, consistent with the holding in ***Ally Mohamed Mkupa v. Republic***, CAT-Criminal Appeal No. 2 of 2008 (unreported). In the cited decision, the upper Bench accentuated that *"where one claims to have identified a person at night there must be evidence not only that there*

was light, ***but also the source and intensity of that light. This is so even if the witness purports to recognize the suspect"*** [Emphasis added].

See also ***Kulwa s/o Mwakajape & 2 Others v. Republic***, CAT-Criminal Appeal No. 35 of 2005 (unreported).

In terms of PW1's testimony, the rape incident occurred at 19.00 hours in the night of the fateful date. By any standard, this was a night time and the sun had set down, meaning that in the absence of a different source of light, the incident occurred in darkness. This infers that identification of an assailant such as the appellant had to depend on the aid of some light, even where the said assailant is a person known to the victim. Thus, while there may no qualms on the victim's alleged knowledge of the appellant prior thereto, what is significantly crucial is the fact that such knowledge would make sense if the identifier and an opportunity of getting to see her assailant in the bright light that would reduce the possibility of mistaken identity. Neither the source of the light, if any, nor its intensity were disclosed by the victim or any other witness.

It is fair to conclude that what is purported to be the respondent's identification of the appellant was nothing but a casual statement which is

misleading. I am not persuaded that such a general statement would constitute the basis for grounding a conviction, lest the courts abdicate the duty bestowed on them in the half a century's astute reasoning in English case of ***S [an infant] v. S Manchester City Recorder and others*** [1969] 3 All E.R. 1230, It was emphasized in that case that:

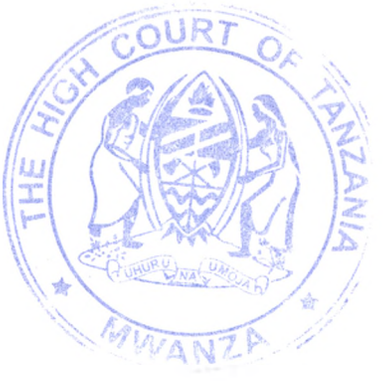
> ***"The desire of any court must be to ensure so far as possible that only those are punished who are in fact guilty****. The duty of a court to clear the innocent must be equal or superior in importance to its duty to convict and punish the guilty.* ***Guilt may be proved by evidence****....."* [Emphasis is added].

Uncertainty and lack of clarity on the firmness of the visual identification, means that proof of the appellant's guilt has not been demonstrated. The prosecution has simply failed to prove the case beyond reasonable doubt, and the inevitable conclusion is to hold that ground eight of the appeal is meritorious and it is allowed. Based on this ground alone, the appeal is allowed.

Accordingly, I quash the conviction and set aside the sentence, and order that the appellant be set free, unless is held in custody for some other lawful cause.

It is so ordered.

DATED at **MWANZA** this 28th day of June, 2021.



M.K. ISMAIL

JUDGE

Date: 28/06/2021

Coram: Hon. M. K. Ismail, J

Appellant: Present online.

Respondent: Ms. Ghati Mathayo, State Attorney

B/C: J. Mhina

Court:

Judgment delivered in chamber, in the appellant's virtual presence and that of Ms. Ghati Mathayo, State Attorney for the respondent, this 28th day of June, 2021.

M. K. Ismail

JUDGE

At Mwanza

28th June, 2021