IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

HC CRIMINAL APPEAL NO. 50 OF 2021

(Appeal from the judgment of Geita District Court, Hon A.E. Katemana-RM, dated 29th January 2021 in Criminal Case No. 307 of 2016)

JUMA MAYALA..... 1ST APPELLANT

KHAMIS ABDALLAH..... 2ND APPELLANT

MNANKA LYOBA..... 3RD APPELLANT

GOODLUCK FAUSTINE..... 4TH APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

4/8/2022 & 2/9/2022

ROBERT, J:-

The four appellants herein were arraigned before the District Court of Geita charged with the offence of Armed Robbery contrary to section 287A of the Penal Code [Cap 16 RE 2002] as amended by Act No. 03 of 2011. It was alleged that, on 17/05/2016 at around 2:00hrs at Mwatulole Street within the District and Region of Geita, the appellants did forcefully steal cash money TZS 85,000/=, mobile phone make Nokia worth TZS 35,000/=, mobile phone make Huawei worth TZS 160,000/=, TV make Singsung worth 380,000/= all properties valued at TZS 660,000/= the properties of WP.7329 PC Martha and immediately before that stealing did threaten her with a panga in order to retain the said properties.

Further to that, two of the four appellants, Juma Mayala and Khamis Abdallah, were additionally charged with another offence of Rape contrary to section 131(1) and (2) of the Penal Code (supra). The prosecution alleged that, the two accused persons, on 17/05/2016 at around 2:00hrs at Mwatulole Street within the District and Region of Geita, jointly and together did unlawfully have carnal knowledge of one Tumaini d/o Emiliano.

After a full trial, the trial Court found the appellants guilty of both offences as charged and proceeded to pass sentence for the respective offences. Aggrieved, the appellants preferred an appeal to this Court armed with the following grounds:

1. *That the conviction was wrongly based on visual identification evidence which was inconclusive as far as the location where the alleged light and its intensity was situated and illuminated wherefrom were not known but the trial court overlooked this fact.*
2. *That, neither independent civilian/recipient, arresting personnel (police officer or else) nor any hamlet leader(s) had testified to prove on whether the appellants peculiar descriptions were disclosed earlier on during reporting of the first felony report if were all identified at the scene.*
3. *That, penetration as a crucial ingredient of rape was not established for wanting proper documentation and scientific evidence by gynaecologist and/or whatever means to link the 1st and 2nd appellants with gang rape offence rather than a fabricated evidence as was relied.*

4. *That confession of the 4th appellant was inconclusive, involuntarily and unlawfully extracted worse enough its contents do not support the evidence thus unfit to base a conviction to the appellant and his co accused/co appellants.*
5. *That the 1st and 2nd appellants do suffer life imprisonment sentence of which were convicted of gang rape whose evidence were not so concrete to prove the matter, beyond reasonable doubt.*
6. *That the trial Court wrongly convicted the appellants basing on uncorroborated evidence born out of the case which is too shaky, unreliable and dubious as in contrast to the strong defence contention.*
7. *That, the trial court (in two instances) did not see the positive answer upon prosecution ill conduct of unexplained unnecessary delayment to arraign the suspected appellants for almost a month lapsed since arrest and restrained at police thus cast doubt on planting the evidence and exhibits.*

The appellants' prayer was to have their appeal allowed and that they be set free.

This appeal was argued orally whereby the appellants represented themselves while the respondent Republic was represented by Ms. Fyeregete, learned State Attorney.

When called on to submit on the grounds of appeal, the appellants had nothing to say except that the grounds of appeal be adopted and determination of their appeal be made on the basis of the raised grounds. They had no additional explanation.

The respondent on the other hand, through the learned State Attorney, Ms. Fyeregete, stated right away that she does not support the appeal. She submitted that the trial court decided the case based mainly on visual identification, confession of the appellants as well as possession of properties recently stolen.

Submitting on the first ground of appeal, the learned State Attorney stated that according to the testimony of PW1, she identified all accused persons and the role played by each accused in committing the crime. She stated further that PW1 knew all appellants prior to the alleged crime and that she could identify them by the aid of electric light and solar light. That testimony was supported by that of PW2 who was also present at the scene and managed to identify all appellants by using electric light and that she also knew the appellants before the crime.

Further to that both PW1 and PW2 stated that the 3rd appellant was known to them as a technician who sometimes used to work at their home and the 4th appellant used to visit him there. As for the 1st and 2nd appellants, these were identified by using electric light as people they used to see passing around their residence.

She submitted further that, the incident lasted for a long time as the appellants demanded to be given money, the 1st appellant took PW2 to

the kitchen and demanded a key to the door. He could not open the door and asked PW2 to open it for him after which he together with 2nd appellant took PW2 outside, raped her in turns and later returned her to the house. It was her view that the crimes took long enough for the victims to be able to identify the appellants properly.

With regards the extent of light, she submitted that though it was not stated in evidence, each case should be decided on its own facts. In this case the victims knew the assailants prior to the commission of the crimes thus the light was only helpful in identifying them given the time spent by the appellants inside the house. She then prayed for this ground of appeal to be dismissed for lack of merit.

On the second ground of appeal, she submitted that the evidence of PW9 at page 100 of the proceedings, who investigated the case testified that the victims had mentioned the appellants by their names which helped in arresting the appellants. He further testified that after arresting the 4th appellant, he mentioned his accomplices, 1st to 3rd appellants. According to PW9, the 2nd and 3rd appellants were already arrested in connection to other crimes and the 2nd appellant was found in possession of a mobile phone, which was stolen from PW1, which he had submitted at the police station as personal property during his arrest. The prisoner

property report (PPR) and the handset were admitted in evidence as exhibits P7 and P8 respectively. She prayed that this ground be dismissed too.

The learned State Attorney submitted with regard to the third ground of appeal that the offence of rape was proved against the 1st and 2nd appellants as the victim explained how she was raped by the first two appellants as shown in page 25 of the typed proceedings, also the evidence of PW3 a Medical Doctor, who testified that PW2 had been raped. PF3 was also admitted as P2.

With regard to the fourth ground, it was submitted that the 4th appellant's cautioned statement was admitted as P5 after the trial court had conducted an inquiry and satisfied that it was recorded voluntarily.

Regarding the fifth ground of appeal, the learned State Attorney submitted that it is the same as the third ground of appeal and stated further that the offence of rape was proved beyond reasonable doubt based on the evidence of PW2 who was the victim and who identified the assailants, PW3 a Medical Doctor and P2, a PF3, which proved that PW2 was raped. She prayed that this ground be dismissed.

Coming to the sixth ground of appeal, it was her submission that the evidence which implicated the appellants was that of PW1 and PW2 who

visually identified the appellants at the crime scene. The appellants were also linked to the crime through a handset that was found in possession of the 2nd appellant and later identified by the victims as one of the properties stolen during the incident. Another evidence was that of PW4 who was found with a TV set which he claimed to have bought from the 4th appellant and which was identified by the victims as one of the items stolen during the incident. She thus prayed for the ground to be dismissed.

With respect to the seventh ground of appeal, the learned counsel for the respondent stated that there is no evidence indicating that the appellants were delayed from being taken to court for one month and that even if there was such evidence, it was not proved that the said delay resulted into fabrication of evidence by the prosecution.

She concluded her submissions by stating that the trial court was right in convicting the appellants in both counts and prayed that this appeal be dismissed.

In their brief rejoinder, the 1st appellant stated that he was not subjected to any scientific testing to prove that he was the one who raped PW2.

The 2nd appellant submitted regarding identification that it is not easy to identify someone who is just passing thus the first ground should be well considered. He submitted further that there is no evidence that he was arrested and remanded in police in connection to another crime. He prayed that the said evidence be well examined.

The 4th appellant submitted that the trial court failed to establish the extent of light used to identify the individuals who committed the alleged crime as the evidence adduced is doubtful.

The 3rd appellant submitted that there is no evidence indicating that the victims cried for help. Further, no any person from the area where the crime allegedly happened was called to testify on what happened as all evidence came from the victims and police officers. He urged this court to look into that.

That marked the end of submission with regards this appeal. I have carefully considered the said submissions made by the parties in the light of the records of appeal before this court and grounds raised; the question for determination is whether this appeal has merit.

With regard to the first ground of appeal, it was the appellants argument that their conviction was wrongly based on visual identification which was inconclusive as there was no evidence regarding the source

and intensity of the light. This argument was however strongly contested by the learned State Attorney for the respondent who argued that there was enough evidence on identification as both PW1 and PW2 stated that there was enough source of light from electricity and solar power and the fact that the appellants were not at all new to the victims, they had seen them before the incident.

I wish to state with regard to this complaint that the issue of identification of an accused person is very crucial in proving the involvement and guilt or otherwise of the said accused with respect to a crime with which that accused is charged of committing. A proper identification is required so as to have all chances of mistaken identity eliminated. To ensure this, the Court of Appeal of Tanzania in **Waziri Amani vs Republic** [1980] TLR 250 set out conditions which are regarded as favourable in visual identification of an accused person. It stated;

> *"evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court should act on evidence visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight"*

It stated further that;

> *"the time the witness had the accused under observation, the distance at which he observed him, the conditions in which such observation occurred for instance whether it was day or night time, whether there was good or poor lighting at the scene, and further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity"*

In the matter at hand, the incident took place at night hours but according to the testimony of PW1 and PW2 who were present at the scene of crime, there was enough light from electricity and solar energy. These being the victims and sole prosecution eye witnesses testified that they were able to identify the appellants as there was enough light both in the house and outside as security lights were also on. They further testified that the incident lasted for a long time and the appellants kept asking them questions, required them to surrender cash, took the items and ordered them to stay quiet until they disappeared.

Moreover, it was their testimony that it was not the first time they had seen the appellants, as the third appellant used to work as a

technician at their home and several times the fourth appellant would come and visit him there. As for the first and second appellants, PW1 and PW2 stated that these were also not new because they used to pass by their home several times. Also, the fact that according to the testimony of PW2 that they ordered her to lay on a sofa and then took her outside the house, had sexual intercourse with her, in turns, and later brought her back into the house, she was thus able to identify them.

When one applies the above quoted principle to the testimony of the PW1 and PW2, it is without a doubt that all possibilities of mistaken identity were cleared as it was proved that the incident took a long time so the victims had enough time with the appellants so as to clearly observe them. As for the distance, the incident happened in their house they were all in the house except for the third accused who PW1 and PW2 claimed to have seen standing at the gate, and that they were talking to them ordering them to surrender items etc. As to the question whether there was enough lighting, it was testified that there was enough light from electricity and solar power and that the victims had seen and knew the appellants before the incident.

It can therefore be stated that, the evidence regarding visual identification met the threshold set out in the **Waziri Amani** case (supra).

With regards to the issue that it was the only evidence relied by the trial Court, I will state that that complaint is unfounded as the trial Court did not rely solely on visual identification as claimed by the appellants. There were other piece of evidence independent of PW1 and PW2's testimony such as the evidence of the second appellant being found with an item, a handset allegedly stolen from the crime scene and that of PW4 who testified to have bought a TV set from the fourth accused who was with another person that he did not recall. I thus find the first ground meritless.

With regards to the second ground of appeal which holds a complaint that there was no evidence that the appellants' descriptions were disclosed if they were identified at the crime scene, the answer to this ground is found in the evidence of PW9 who testified to have read the victims' statements in which they mentioned the appellants especially third appellant who used to work as their technician who they knew as MNANKA. Further to that, it was in evidence that the first appellant did mention other appellants when he was interrogated by the police. Also, the cautioned and extra judicial statements of the fourth appellant which were admitted in evidence as exhibit P5 and P4 respectively in which he

mentioned all the appellants to have participated in the commission of the crime.

This Court finds that, there was enough evidence that the appellants were identified and they mentioned each other during their interrogation. Hence, this ground is also dismissed for lack of merit.

As for the third ground of appeal in which the compliant is that there was no evidence of penetration which is a crucial ingredient of rape, I can state right away that I fully subscribe to the argument put forward by the learned State Attorney for the respondent that the principle is clear that in rape cases, the best evidence is that of the victim as enunciated in **Selemani Makumba vs Republic** (2006) TLR.

In the matter at hand, it was the testimony of PW2 who was the victim of rape that the 1st and 2nd appellant took her outside the house to an unfinished building which was next to their home and took turns in raping her before taking her back into the house. It was further testified that she was taken to the hospital that same morning after she had reported to the police and given a PF3, where she was examined and it was proved that she had been penetrated as there was blood and bruises in her private parts as evidenced by PW3 who was a Clinical Officer and

who conducted the said examination on the PW2 and later filled the PF3 which was admitted in evidence as exhibit P3.

Apart from that, there was also evidence in the cautioned statement as well as the extra judicial statement of the 4th appellant which were admitted as exhibits P4 and P5 in which the 4th appellant narrated how the 1st and 2nd appellants took the victim outside the house, raped her and brought her back inside. This Court considers that to be sufficient evidence to prove the commission of the alleged crime by the first two appellants. Hence, I dismiss this ground.

Coming to the fourth ground of appeal which touches on the validity of the confession by the 4th appellant, the evidence speaks otherwise as the said statement passed through trial within trial and the trial Court accepted and admitted it in evidence as exhibit P5 after the defence, 4th appellant, failed to prove the alleged torture. The argument that the contents of the said statement do not support the evidence adduced, I would say without hesitation that it does support the testimonies of the witnesses especially PW1, PW2, PW3, PW4. Further to that it can be seen in the records of the appeal that the trial Court did not only base on the 4th appellant's statement but also considered other independent pieces of

evidence from the witnesses and the extra judicial statement of the 4th appellant.

With respect to the fifth ground, the same has been tackled automatically when dealing with the third ground of appeal that there was enough evidence to prove the offence of rape. The same applies to the sixth ground of appeal thus I will not labour responding to these grounds again.

On the last ground of appeal, I join the counsel for the respondent in her argument that the appellants have not shown how the alleged delay caused injustice or how it led to the evidence being fabricated against them by the prosecution. I therefore find this ground to be lacking in merit.

On the foregoing, this court finds no merit in this appeal. Consequently, I find no reason to disturb the decision of the trial Court, I uphold the conviction and sentence of the trial Court and dismiss this appeal in its entirety.

It is so ordered.

K.N.ROBERT
JUDGE
2/9/2022