IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MKUYE, J. A., KOROSSO, J.A And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 568 OF 2020

JUMA OMARY.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dodoma)

(Siyani, J.)

dated the 4th day of September, 2020

in

DC. Criminal Appeal No. 56 of 2019

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JUDGMENT OF THE COURT

28th November & 8th December, 2022

MKUYE, J.A.:

Before the District Court of Singida at Singida, the appellant Juma Omary @ Omary was charged with an offence of rape contrary to sections 130 (1) (2) (b) and 131 (1) of the Penal Code [Cap 16 R.E 2002; now R.E. 2022]. It was alleged that on 24th day of September, 2019, at 04:00 hours, at Mununguna area, Minga Ward, Mungumaji Division, within the District and Region of Singida, the appellant did have sexual intercourse with one Pili Said @ Senge by the use of force.

Upon a full trial, he was convicted and sentenced to thirty years imprisonment. Aggrieved with that decision, he appealed at the High

Court vide DC Criminal Appeal No. 56 of 2019 but the same was dismissed for lack of merit. Still undaunted, he has lodged the appeal to this Court.

Before embarking on the merit of appeal, we find it appropriate to give a brief background of the matter leading to this appeal. It goes thus:

On the fateful date, the victim (PW1) paid a visit to her co-wife Halima Ramadhani (PW2) in view to attending a ceremony. PW1 spent a night at her co-wife's residence and they slept in the same room. However, in the night, they were awakened by an intruder into the house who had with him a machete. Upon entry, that intruder engaged PW2 in a short dialogue whereby he inquired from her as to whereabouts of her son who he described his physique, that he was possessing his money. PW2 replied that she had no such son. This reply angered the intruder to beat PW2 with a machete.

Thereafter, the intruder held PW1's hand and took her into the sitting room. While there according to PW1, she undressed her underpants and the intruder did the same then he told her to bend over whereupon he proceeded to sodomise her. After completing that exercise, he also raped her. The intruder left the place, then PW1 and

PW2 went outside for a short call but they saw that person coming back and it is then that they raised alarm and people gathered.

PW2 testified among others that she was able to identify the intruder as being the appellant, her neighbour, through a torch light he shone in the direction of PW1.

Through instructions by Jumanne Iboma (PW3), the appellant was traced where upon he was arrested and brought at PW3's home where PW1 and PW2 allegedly identified him. The appellant was taken to the Police Station where his cautioned statement was recorded allegedly confessing the offence.

In his defence, the appellant denied association with the offence and testified to have been arrested at his home at about 08:00 hours, the evidence which was supported by Hamza Juma Omary (DW2).

The appellant has fronted six grounds of appeal to the effect that **one,** the first appellate court upheld the conviction against the appellant while the prosecution failed to prove the case beyond reasonable doubt; **two,** the appellant was convicted on evidence coupled with procedural irregularities; **three,** the first appellate court acted on evidence of PW4 without being properly scrutinized as her report did not indicate that there was penetration, which was a fundamental element in proving the offence of rape. **Four**, the appellant was convicted on uncorroborated

evidence; **five,** the appellant's defence was not considered; and **six,** the appellant's identification by recognition was not water tight.

At the hearing of the appeal the appellant appeared in person without any representation whereas the respondent Republic was represented by Ms. Catherine Gwaltu, learned Principal State Attorney teaming up with Mr. John Kidando, learned State Attorney.

On being given an opportunity to expound his grounds of appeal, the appellant prayed and leave was granted to him to adopt his grounds of appeal. He then opted to let the learned State Attorney respond first so that he could respond later, if need would arise.

On the other hand, Mr. Kidando who represented the respondent prefaced his submission by declaring their stance that they did not support the appeal. However, on reflection, Ms. Gwaltu took over and indicated their position that they supported the appeal on account that there were several shortcomings in the prosecution's evidence. For instance, she pointed out that, **one**, the visual identification was not watertight and that the appellant was not properly identified because of the poor torch light relied by witnesses to identify the appellant. She was of the view that, the torch light was not a good light to enable proper identification. **Two**, although PW1 and PW2 said that they mentioned the appellant to people who responded to the alarm PW2 and

PW3 had raised, those people who gathered were not known and did not testify in court. Under the circumstances, she argued that, the appellant cannot be said to have been identified properly.

The learned Principal State Attorney, further argued that, although the cautioned statement (Exh. P2) was also relied upon in mounting a conviction against the appellant, the same was defective since the certification made was under section 10 (3) of the Criminal Procedure Act, [Cap 20 R.E 2019] (the CPA) instead of section 57 of the CPA.

Moreover, the learned Principal State Attorney went on assailing the prosecution evidence contending that it was marred with inconsistencies as to the place where and time when the appellant was arrested. She said, while PW1 stated that he was arrested at the scene of crime after they had raised alarm, PW2 and the appellant said that he was apprehended at his home at 08:00 hours.

Due to all these shortcomings Ms. Gwaltu argued that the prosecution case was not proved beyond reasonable doubt and she implored the Court to find merit in the appeal and allow it.

In rejoinder, the appellant welcomed the concession by the learned Principal State Attorney and had nothing to add.

We have examined and considered the grounds of appeal and the submissions from both sides and, we think, the issue for our

determination is whether the prosecution was able to prove the case beyond reasonable doubt.

As was righty stated by the learned Principal State Attorney, the conviction of the appellant was based on identification evidence. The trial court found that PW1 and PW2 identified the appellant by using torch light adding that PW2 saw him when he directed the torch to PW1; and that she knew him as her neighbour whom she even knew his mother who was called Moimange. Also, the trial court found that the witness (PW2) mentioned the appellant immediately after the incident to the neighbours who responded to the alarm. Apart from that, the trial court found that despite the fact that the identification was done under unfavourable conditions, it was corroborated by the cautioned statement.

The first appellate court upheld conviction on the grounds that even if PW2 did not give description of the appellant that night, she identified him as her neighbour and that she named him immediately after the incident something which led to his arrest. The other reason was that he confessed to have committed the offence.

It is now a well settled principle of law that the evidence of visual identification is the weakest kind and unreliable and that courts of law are required not to act on it unless all possibilities of mistaken identity

are eliminated and the court is satisfied that such evidence is watertight. [See - **Waziri Amani v. Republic**, (1980) TLR 250, **Raymond Francis v. Republic**, [1990] TLR 100; **Aidan Malulenga v. Republic**, Criminal Appeal No. 207 of 2006; **Juma Machemba v. Republic**, Criminal Appeal No. 102 of 2015; **Mabula Makoye and Another v. Republic**, Criminal Appeal No. 227 of 2017; **Lee Lenina and Another v. Republic**, Criminal Appeal No. 356 of 2018; and **Hussein Said @ Baba Karim @ White v. Republic**, Criminal Appeal No. 298 of 2017 (all unreported).

Even in the case where the witness is familiar to the suspect, the courts are required to be vigilant because mistakes in recognition of even close relatives do happen. This was emphasized in the case of **Issa Mgava @ Shuka v. Republic**, Criminal Appeal No. 37 of 2005 (unreported) where the Court had this to say:

> *"... clear evidence on source of light and its intensity is of paramount importance. This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relative and friends are often made."*

As regards the description of the suspect by the witness, the defunct Court of Eastern African in the case of **Mohamed Alhui v.**

Republic (1942) 9 EACA 72 which was cited with approval in the case of **Raymond Francis** (supra) stated as follows:

> *"In every case in which there is a question as to identity of the accused, the fact of there having been a description given and the terms of that description given are matters of the highest importance of which evidence ought always to be given;* ***first of all, of course, by the persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given."*** *(Emphasis added)*

In this case, there is no doubt that PW2 testified to have identified the appellant because of among others that there was a torch light flashed towards PW1 which enabled her to identify him and that she knew him as her neighbour whose mother was also known to her. Unfortunately, she did not describe the intensity of the torch light or explain the distance from where she observed and even the size of the room was not explained. - See **Amani Waziri** (supra).

Regarding the torch light, it has been held that it is not such a good source of light to enable proper identification. For instance, in the case of **Oscar Mkondya and 2 Others v. The D.P.P,** Criminal Appeal

No. 505 of 2017 (unreported), the Court observed in relation to torch light that:

> *"It is a fact that torch light assists the holder of it to see the place and persons flushed against unless it is established that he had an occasion to flush onto him."*

Then, the Court in the same case, went on to conclude that:

> *"... In the instant case there was no evidence by the trio that at any moment the bandits turned around and flushed their torches onto each other. In the circumstances, the claim that the torch light assisted the trio to positively recognize the appellants is inconceivable."*

Even in this case, the record bears it out that PW2's evidence was that she identified the appellant when he flushed torch light to PW1. According to the above cited case, such torch light enabled him to see PW1. Unfortunately, there is nowhere in the record where either PW1 or PW2 said that the appellant had at any occasion flushed it onto himself. In this regard, coupled with the other deficiencies relating to identifications and the circumstances which were terrific as the appellant was holding a machete and, therefore, making the conditions to be unfavourable for identification; we are inclined to hold the view that the witness was not in a position to identify the appellant properly.

The other reason for conviction of the appellant which was relied by both courts below was that PW2 had mentioned him immediately to neighbours who responded to the alarm raised. We agree that, the ability to mention the suspect at the earliest opportune time after the incident is the assurance of reliability of the witness – see **Marwa Wangiti Mwita and Another v. Republic** [2002] T.L.R. 39; **Jaribu Abdalla v. Republic** [2003] T.L.R. 271; and **Minani Evarist v. Republic**, Criminal Appeal No. 124 of 2007 (unreported).

Ordinarily if the witness mentions a suspect to someone, that other person is expected to corroborate that evidence in court. This position was taken in the case of **Samwel Nyamhanga v. Republic,** Criminal Appeal No. 70 of 2017 (unreported), where the Court while was faced with a similar situation stated as follows:

> *"In the present appeal, there is no evidence suggesting that the appellant was mentioned at the earliest opportune time as found by the first appellate court. The only available evidence is that PW1 knew the appellant before without further explanation on how he came to know him. He said, he mentioned the appellant at the time when he returned PF3 but we are not told whether that was the first available opportunity for him to do so.* ***There being no further evidence coming from the person to whom***

the ordeal was reported we failed to find credence on PW1's evidence. *To us there is no connection between the appellant's arrest made on 19th September, 2013 and the incident that occurred on 16th September, 2013.* ***This loose end could easily have been everted by calling a police officer to whom it was alleged that the matter was reported. Failure of calling that police officer diminishes the credibility of PW1's evidence."***

[Emphasis added]

Also, in the case of **Phinias Alexander and 2 Others v. Republic,** Criminal Appeal No. 276 of 2019 (unreported), the Court stated as follows:

"In the light of the reproduced victim's evidence at the trial, the earliest opportune time was her encounter with the neighbours. That apart, none of the neighbours who initially attended the victim was paraded as a prosecution witness. This leaves a lot to be desired ***because those neighbours were in a position to testify if the victim had mentioned the appellants after regaining consciousness and strength.*** *Besides, it was not stated if the victim's neighbours were not within reach or could not be found and as such failure to*

summon them entities this Court to draw an inference adverse against the prosecution."

However, in this case, much as PW2 testified to have mentioned the appellant to people who gathered after the alarm was raised, she did not mention them and none of those people was called to testify in court on that aspect. As it is, it is uncertain if PW2 really mentioned him to anybody or not much as it is alleged that information facilitated the appellant's arrest. As was held in **Samwel Nyamhanga's** case (supra) failure to mention or call the people to whom the appellant is alleged to have been mentioned by PW2 to testify in court diminishes the credibility of her evidence.

We also agree with the learned Principal State Attorney that the cautioned statement of the appellant was another evidence that was relied upon by the trial court to convict the appellant. In particular, the trial court found that the identification evidence was corroborated by the appellant's cautioned statement (Exh P2) in which he is alleged to have confessed to rape. Likewise, the first appellate court upheld the conviction of the appellant on the basis that the appellant had confessed in the cautioned statement to have committed the offence as the same was admitted without any objection; and that its contents resembled what PW1 and PW2 testified in court.

The learned Principal State Attorney's concern is that the cautioned statement cannot be relied upon for being wrongly certified under section 10 (3) of the CPA instead of section 57 (3) of the CPA.

Section 10 (3) of the CPA under which the appellant's cautioned statement was certified states that:

> *"Any police officer making an investigation may subject to the other provisions of this Part, examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined."*

Our reading of the above provision is that it deals with examination by the police officer of any person who is expected to be acquainted with the facts of the case, in which case, he has to reduce such statement in writing in accordance with the said provision. What is notable is that the said provision does not provide for a requirement of certification.

As opposed to that provision, section 57 of the CPA governs the recording of the interview by the police officer for purpose of ascertaining whether or not such person committed the offence. The police officer is required under sub section (3) to make a certification on the record. The said sub section provides as follows:

"57 (3) A police officer who makes a record of an interview with a person in accordance with subsection (2) shall write, or cause to be written, at the end of the record a form of certificate in accordance with a prescribed form and shall then, unless the person is unable to read -

(a) show the record to the person and ask him -

(i) to read the record and make any alternation or correction to it he wishes to make and add to it any further statement that he wishes to make;

(ii) to sign the certificate set out at the end of the record; and

(iii) if the record extends over more than one page, to initial each page that is not signed by him; and

(b) if the person refuses, fails or appears to fail to comply with that request, certify on the record under his hand what he has done and in respect of what matters the person refused, failed or appeared to fail to comply with the request."

Our understanding of this provision is that it requires, among others, the police officer who recorded the interview from the suspect or

a person suspected to have committed an offence, to certify at the end of the record reduced in writing and if the suspect can read, ask him to sign the said certificate. According to the said provision, the requirement to certify the record is couched in the mandatory form. This means that it has to be complied with. Also, the provision prescribes other conditions in case the person is able to read.

In this case, we agree with both attorney that the certification of the appellant's cautioned statement was made under section 10 (3) of the CPA. This is clearly seen at page 29 of the record of appeal where the police officer No. G.3535 DC Damas made such a certification. However, the said provision is not only applicable to the cautioned statement but also it does not have a requirement of certification. This was in violation of the mandatory provisions of section 57 (3) of the CPA which provided for such a requirement. In our view, certification has a purpose of authenticating the truth of what the police officer had recorded and therefore, failure to do so or doing so under non-existent law, would render the same as if no certification was made at all.

In the case of **Christina Damiano v. Republic,** Criminal Appeal No. 178 of 2012 (unreported) in which the provisions of section 57 including sub section (3) were contravened, the Court found that such contravention affected the trial and proceeded to expunge the cautioned

statement. [See also **Mereji Logori v. Republic**, Criminal Appeal No. 273 of 2011 (unreported).

Even in this case, we are settled in our mind that failure to comply with the provisions of section 57 (3) of the CPA had the effect of affecting a fair trial of the appellant since the authenticity of the appellant's cautioned statement remains uncertain. We, thus, expunge the appellant's cautioned statement from the record.

The other area of complaint was that there was a contradiction among the witnesses regarding the place and time where the appellant was arrested. Our perusal of the record of appeal has revealed that while PW1 said the appellant was arrested at the scene of crime after the people gathered following the alarm raised by them, PW2 said he was arrested at his home at 08:00 hours which was also supported by the appellant and DW2.

Indeed, this was a clear discrepancy. Since PW1 and PW2 were at the same place, they were expected to witness a similar thing unlike the way it happened. The contradiction in our view goes to the root of the matter in the sense that it vitiates the credibility of the witnesses. This taken together with other shortcomings makes us to conclude that the prosecution failed to prove the case beyond reasonable doubt.

In the circumstances, we allow the appeal quash the conviction and set aside the sentence imposed on the appellant. We further order for his immediate release unless held for some other lawful causes.

Order accordingly.

DATED at **DODOMA** this 7th day of December, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 8th day of December, 2022 in the presence of the Appellant in person and Mr. Henry Chaula, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL