

IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA
(CORAM: RAMADHANI, C.J., MUNUO, J.A., And MJASIRI, J.A.)
CRIMINAL APPEAL NO. 154 OF 2005

AHMAD OMARI.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(LUKELELWA, 1)

Dated the 29th day of June, 2005

i n

Criminal Appeal No. 24 A of 2005

JUDGMENT OF THE COURT

November 18 & 27, 2009

MJASIRI, J.A.:

In the District Court of Liwale, the appellant, Ahmad Omari and three others were charged with the offence of gang rape contrary to section 130 (2) and 131 A (1) and (2) of the Penal Code Cap 16, R.E. 2002 as amended by the Sexual Offences Special Provisions Act (Act No. 4 of 1998)

and were sentenced to a term of life imprisonment. Being aggrieved with the decision of the District Court, the Appellants appealed to the High Court against both conviction and sentence. The appellant's appeal was unsuccessful and the conviction in respect of the other three appellants was quashed and the sentence of life imprisonment set aside, hence this second appeal.

The appellant filed eight (8) grounds of appeal the effect of which is that there was no sufficient evidence to base his conviction and that the prosecution evidence, taken as a whole, did not prove the case against him beyond reasonable doubt. That the offence of rape was therefore not committed by the appellant.

At the hearing of the appeal the appellant was unrepresented. The Republic was represented by Ms Evetta Mushi, learned State Attorney.

The background to this case is as under: PW1, the complainant in this case filed a complaint to the police that she was gang raped by four people. On the material date she had gone to visit her friend Judith. At about 09.00 p.m. while coming from her friend's house she was called by the first appellant. The appellant forcefully pushed her inside his house and dragged her to his bedroom where she encountered the three other accused persons. They removed her clothes, tied her up and covered her face and her mouth. In her testimony, she stated that she was raped by

the first accused (appellant) and the second accused. After the ordeal with the second accused she cried out for help, nobody came to her assistance but all the accused persons ran away. She identified the appellant and the second accused person because there was moonlight and she also knew them. The Appellant denied the charge and any involvement with the offence in question.

The appellant adopted his memorandum of appeal as part of his submission and had little to add by way of elaboration.

Ms Mushi did not support the conviction of the appellant. She submitted that the prosecution did not prove the case against the appellant beyond reasonable doubt. She stated further that the only evidence against the appellant was that of PW1. PW1 did not give a comprehensive account of what actually transpired when she entered the appellant's house. She submitted that PW1 stated that she found the three other accused persons in the appellant's room in her examination in chief. However during cross examination PW2 stated that after she was pushed in the appellant's room the other accused persons entered. PW1 also testified that it was the first and second accused persons who raped her. Ms Mushi argued that given the appellant's state and the fact that her face was covered, it was not possible for her to identify the people who raped her. Ms Mushi also submitted that there is evidence to show that the appellant and PW1 knew each other and PW1 was seen going to the appellant's house. She therefore concluded that the evidence of PW1 was unreliable.

The crucial issue to be determined is whether or not PW1 was raped and whether or not it was the appellant who committed the rape. The only evidence linking the appellant with the offence is that of PW1. As to the actual rape and the identity of her assailants, the complainant was a single witness whose evidence called for a cautionary approach. Is she a credible witness? The trial Court did not analyse the evidence of PW1. The learned trial magistrate simply summarized what each witness stated and the PF.3 report. The conclusion reached by him is reproduced as under:-

"Complainant proved in this Court that she was raped by two people 1st accused person and 7th accused persons. 1st and 4th accused persons tied or covered with the complainant's cloth in order complainant not to alarm and gave a chance to the 1st and 7th accused persons to rape the complainant easily".

On appeal to the High Court, the learned High Court Judge categorically stated that the trial magistrate did not analyse the evidence. He made his own evaluation of the evidence and concluded that PW1 was a credible witness. We are inclined to agree with the submissions made by the learned State Attorney. In our view the evidence of PW1 was unsatisfactory in many respects. It was of the essence for the Court to determine whether PW1 found the three other people in the appellant's room, or they came in after PW1 was shoved in the room. PW1 gave two different accounts. PW1's identification of the appellant and others was not clear cut given the sequence of events and the fact that PW1's face was covered. It is clear from what is set out above that that there were

serious shortcomings in the complainant's evidence which diminish her credibility as a witness. The first appellate Court fell into the error of making a finding that she was a credible witness without taking into account all these shortcomings. Even though a fact may be proved by the testimony of a single witness there is a need for testing with greatest care the evidence of a single witness. See *Abdullah Bin Wendo v R* and (1953) 20 EACA 166; *Roria v Republic* (1967) EACA; *R v Turnbull* 1977 QB 224; See *Mburu and another v R* (2008) 1 KLR 1229 and *Vhengani v The State* [2007] SCA 76 (RSA).

In *Anil Phukan v State of Assam* 1993 AIR 1462 it was held as follows:

"A conviction can be based on the testimony of a single - eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone".

The law is also clear that there is no particular number of witnesses required for proof of any fact (Section 143 of the Evidence Act, Cap 6 R.E. 2002) and that subject to well known exceptions, a fact may be proved by the testimony of a single witness. On the other hand, the burden weighs heavily on any Court considering the solitary evidence of a witness in respect of identification. The caution in the *Abdullah Wendo* case is that such evidence must be tested with greater care.

We are fully aware that there is no formula to apply when it comes to consideration of the credibility of a single witness. The trial Court will weigh the evidence, will consider its merits and demerits and having done so, will decide whether or not it is trustworthy despite the fact that there are shortcomings and / or defects or contradictions in the testimony. In *Hassan Juma Kanenyera and Others v Republic* [1992] TLR 100 CA, it was stated that it is a rule of practice, not of law, that corroboration is required of the evidence of a single witness of identification of the accused made under unfavourable conditions; but the rule does not preclude a conviction on the evidence of a single witness if the court is fully satisfied that the witness is telling the truth. In the circumstances of this case, we have reluctantly come to the conclusion that it was necessary to examine other circumstances or otherwise, supporting PW1's assertion in respect of the identity of the appellant.

In a criminal case the burden of proof is on the prosecution to prove the case against the appellant beyond reasonable doubt. The burden never shifts (Section 3(2) (a) of the Evidence Act). While we have no problem in reaching a conclusion that the evidence on record supports the allegation of rape, we are not satisfied that the prosecution has established on the standards required under the law that it was the appellant who committed the act of rape. Cumulatively all the defects in the complainant's evidence lead to the conclusion that her evidence did not measure up to the requisite standard both in relation to credibility and

reliability. We are therefore hesitant to uphold the conviction of the appellant based on her testimony.

For the foregoing reasons, we hold that the Appellant's conviction was not proper. We accordingly allow this appeal, quash the conviction and set aside the mandatory life sentence. The Appellant is to be released forthwith from prison unless he is otherwise lawfully held. It is so ordered.

DATED at MTWARA this 27th day of November, 2009.

A.S.L. RAMADHANI
CHIEF JUSTICE

E.N. MUNUO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(K I T U S I)
SENIOR DEPUTY REGISTRAR