

**IN THE COURT OF APPEAL OF TANZANIA  
AT ARUSHA**

**(CORAM: MSOFFE, J.A., KILEO, J.A. And ORIYO, J.A.)**

**CRIMINAL APPEAL NO. 289 OF 2007**

**WAZIRI ZUBERI MAKOMBE.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the decision of the Principal Resident Magistrate's Court  
at Moshi)**

**(Mgaya, PRM, Ext. Jur.)**

**dated the 10<sup>th</sup> day of April, 2007**

**in**

**Criminal Appeal No. 16 of 2007**

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**JUDGMENT OF THE COURT**

**17 & 19 August, 2010**

**MSOFFE, J.A.:**

In the District court of Moshi the appellant and three others were charged with rape contrary to sections 130 and 131 of the Penal Code. We wish to pause here and observe that in our evaluation and appreciation of the evidence we are of the considered view that the proper charge ought to have been one of gang rape contrary to section 131A of the Penal Code. Anyhow, the appellant and two others were convicted and sentenced to life imprisonment. In a subsequent appeal to the Moshi Resident Magistrate's Court (Extended Jurisdiction) the appeal by the two others was allowed

whereas that of the appellant was dismissed. Still aggrieved, the appellant has preferred this second appeal.

The appellant preferred a memorandum of appeal containing three main grounds. He subsequently lodged a supplementary memorandum of appeal with three grounds of complaint. In substance however, we wish to associate ourselves with the submission made before us by Mr. Juma Ramadhani, learned Senior State Attorney, that the grounds crystallize on one major ground of complaint: - That there was not enough evidence of identification. Since the appeal stands or falls on this major ground we propose to determine it on the basis of this point.

The facts of the case are simple and straight forward. The appellant and PW1 Chiku Saidi, PW2 Yusuf Mohamed, PW3 Aikade John and PW4 Reginald Elias were neighbours at Njoro, Moshi. Indeed, PW1 and PW2 were wife and husband, respectively. On 23/6/2004 at around 10.00 p.m. the appellant and others "invaded" the room in the house in which PW1 and PW2 were living. They threw stones to the house in order to scare away neighbours and tenants from entering into the room. They then broke into the room with the aid of a big stone popularly known in Swahili

as "Fatuma". After entering into the room they tied PW2 with a rope, assaulted him and took away PW1 after locking PW2 inside the room. When all this was happening PW3 and PW4 were also present. The appellant and his colleagues then took PW1 to a place known as Korongoni where they raped her in turns till she lost consciousness. When she regained her conscience she saw the appellant who said "Tumtoboe macho, tumkatekate, tumpeleke msituni." When they were through with this inhuman act they decided to take PW1 back to her husband. On the way back they washed her private parts in order to conceal any evidence of rape. At around 3.00 a.m. they brought PW1 back to her husband (PW2) where they retorted to him "Tumekurudishia mke wako bila kuumiza". PW1 was medically examined by PW5 Dr. Livingstone Elisante Shayo. In his oral testimony in court and also in the PF3 which he filled in and produced in court without any serious objection from the appellant, he was of the affirmative view that PW1 was raped on the material day.

Mr. Juma Ramadhani, resisted the appeal on behalf of the respondent Republic. In his view, the appellant was duly identified on the fateful day as evidenced by the fact that he was identified by PW1, PW2,

PW3 and PW4 who were his neighbours; the incident took a long period of time; the night was moonlit; all along the appellant stood in close proximity to PW1; and finally that PW1 was familiar with the appellant's voice.

As already stated, identification was, and indeed still is, the key factor in the case. The learned Principal Resident Magistrate (Extended Jurisdiction) addressed, or rather dealt with this crucial issue. She stated: -

*From the trial court's record, the 1<sup>st</sup> appellant Waziri Zuberi was well known to PW1, PW2, PW3 and considering the time spent with PW1 and the fact that they are neighbours for a long time and with the moon that was shining I am satisfied that the trial court properly found that the 1<sup>st</sup> appellant was properly identified as being the victim (PW1's) sexual assailant.*

*In the circumstances of this matter there is no possibility of mistaken identity in the identity of the 1<sup>st</sup> appellant Waziri Zuberi.*

With respect, we are in agreement with Mr. Juma Ramadhani in his submission on the aspect of the evidence of identification in the case. In similar vein, we are in entire agreement with the Principal Resident Magistrate (Extended Jurisdiction) in her evaluation and assessment of the

evidence of identification. The appellant was well known to the witnesses prior to the date of incident. The incident took a long period of time. PW1 was very positive that during the ordeal the appellant was one of her assailants. All along from Njoro to Korongoni and back to Njoro there was moonlight illuminating the areas that PW1 and her assailants passed through. As if all this was not enough, PW1 was familiar with the appellant's voice by virtue of the undisputed fact that they were neighbours for a long period of time. So, as this Court observed in **Stuart Erasto Yakobo v Republic**, Criminal Appeal No. 202 of 2004 (unreported): -

*For voice identification to be relied upon it must be established that the witness is very familiar with the voice in question as being the same voice of a person at the scene of crime - See **Badwin Komba @ Ballo v Republic** (C.A.T) Criminal Appeal No. 56 of 2003 (unreported). (Also see **Kanganja Ally and Juma Ally v Republic** (1980) TLR 270).*

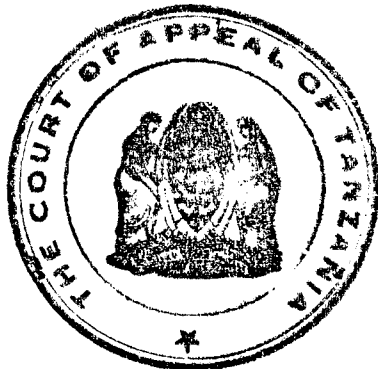
Like the courts below, in the circumstances of this case, we too are satisfied that PW1 was well acquainted with the appellant's voice.

As demonstrated above, the evidence of identification in the case was further strengthened by the evidence of PW5 who upon examining PW1 was satisfied that she was raped. There is nothing in the case to doubt the doctor in his opinion on the rape in question.

In conclusion, we are of the considered view that the appellant was identified on the material day. Thus, there is nothing for us to fault the courts below in their assessment of the evidence particularly on the crucial aspect of identification.

The appeal has no merit. We hereby dismiss it.

**DATED** at **ARUSHA** this 18<sup>th</sup> day of August, 2010.

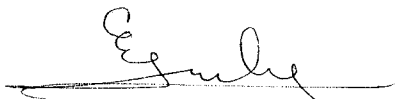


J.H. MSOFFE  
**JUSTICE OF APPEAL**

E.A. KILEO  
**JUSTICE OF APPEAL**

K.K. ORIYO  
**JUSTICE OF APPEAL**

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

  
(E. Y. MKWIZU)  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**