IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MBAROUK, J.A., BWANA, J.A. AND MASSATI, J.A.)

CRIMINAL APPEAL NO. 2 OF 2008

ALLY MOHAMEDI MKUPA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Mtwara)

(Mjemmas, J.)

dated the 5th day of December, 2007
in
Criminal Appeal No. 72 of 2007

JUDGMENT OF THE COURT

8 & 13 OCTOBER. 2010

MASSATI, J.A.:

The appellant was charged with and convicted of the offence of raping a 5 year old girl before the District Court of Mtwara, contrary to sections 130 and 131 of the Penal Code (Cap 16 – R.E. 2002) as amended by the Sexual Offences (Special Provisions) Act No. 4 of 1998. He was sentenced to life imprisonment. His appeal before the

High Court ((Mjemmas, J.) was dismissed. Undaunted he has now appealed to this Court.

The facts that led to the appellant's conviction are these. The victim, ESHA RASHID is the daughter of SOMEYE SWALEHE (PW1)who was the appellant's lover, but previously married to RASHID MUSA DAUDI (PW2). Apart from ESHA, PW1 had another daughter, called BAHATI who was 8 years old. On 27/8/2002 at about 9.00 p.m. PW1 left her two daughters in bed to visit a neighbour. She had not locked the door. Half an hour later, she heard BAHATI, crying. She rushed home. She found her daughters out of the room. BAHATI informed her that ESHA had been raped by the appellant. PW1 went to the appellant's house which was also nearby to confront him, but the appellant refused to come out to satisfy her inquisition.

She immediately decided to report the matter to the ten cell leader, and later to the village chairman (PW6). The latter told her to report back the next morning. On her return home, she examined

ESHA's private parts where she found some bruises. The next day the matter was reported to the chairman, to the children's father (PW2) and the police station at Mitego; but before the arrival of the police the appellant intervened and volunteered to take the victim to Naumbu dispensary for treatment. Before she was treated however, PW2 came with the police who arrested the appellant, and charged him accordingly.

At the trial, a total of 6 witnesses testified for the prosecution. Apart from PW1, PW2 and PW6, the two children also testified as PW3 and PW4, while PW5 was the police officer, who issued the PF3 (which was tendered in court by PW2 as Exh. P1) and arrested the appellant. According to PW1, PW2 and PW6 the appellant had confessed committing the offence and prayed for an amicable settlement of the matter. In his defence the appellant simply denied committing the offence apart from narrating how he was arrested.

In convicting the appellant, the trial court discounted the evidence of visual identification from PW3 and PW4, but found that

PW1, PW2 and PW6 were credible witnesses, and the defence case was branded as too weak "*to exonerate him from criminal liability.*"

The first appellate court reversed the trial's courts finding on visual identification on the ground that the appellant was not a stranger to the witnesses, and that their evidence was corroborated by the appellant's own admission of guilt to PW1, PW6 and his apology to PW2.

Before us, Mr. John Mapinduzi, learned counsel appeared for the appellant. He condensed the 6 grounds of appeal raised by the appellant himself, into three. First, the learned counsel criticized the procedure adopted by the trial court in admitting the PF3 (Exh. P1) and conducting the voire dire examination on the children witnesses PW3 and PW4. He submitted that the PF3 was admitted without first informing the appellant of his rights under section 240(3) of the Criminal Procedure Act (Cap. 20 –R.E. 2002), On the score, the PF3 should be expunged. Secondly, he said that the voire dire examination conducted on PW3 and PW4 was too scanty to enable

the trial court form an opinion on the competency of the witnesses contrary to section 127(2) of the Tanzania Evidence Act (Cap. 6 – R.E. 2002). Mr. Mapinduzi urged the court to give little weight to the testimonies of PW3, and PW4. The next ground of appeal was on visual identification. He submitted that given that the offence was committed at night in the dark and the only light available was that of a match stick light it was difficult to believe that PW3 and PW4 could have identified the suspect without any mistake. Lastly, Mr. Mapinduzi submitted in the last ground of appeal that with the PF3 and evidence of visual identification out of the way, the remaining evidence on record was not sufficient. He said that the evidence of PW6 that PW1 did not tell him whether she knew who raped her daughter was only further proof that the suspect was not recognized, and was not named by PW3 and PW4 to their mother.

In the absence of the PF3, there was no medical evidence of rape. For those reasons, Mr. Mapinduzi urged the Court to allow the appeal.

Mr. Ismail Manjoti and Mr. Peter Ndjike, learned State Attorneys who represented the respondent/Republic did not support the conviction. Mr. Manjoti who argued the appeal, submitted that he fully supported the submission made by Mr. Mapinduzi on all aspects, and argued that with the PF3 out, the remainder of the evidence was insufficient, contradictory and discrepant. He went on to point out that the presence of a mad man outside the house where PW3 and PW4 were sleeping, added to the possibility of mistaken identity and therefore, coloured the evidence of visual identification, by PW3 and PW4. It was also his submission that, the other witnesses were not present but only came to hear about the rape. As to the evidence of admission by the appellant, Mr. Manjoti submitted that Mzee Njali to whom the admission was allegedly made was not called to testify neither did PW5 take his cautioned (the appellant's) statement. There were also contradictions, he went on, between the testimonies of PW1 and PW2, as to whether they went to PW6 together or not. So, in his view, the prosecution case was not proved beyond reasonable doubt and so any doubts should be resolved in favour of the appellant. He urged us to allow to appeal.

It cannot be disputed that visual idenfication of the appellant was at stake in this appeal. This is because, the offence was committed not only at night, but, it was also dark. It is now settled law that for a court to act on the evidence of visual identification, it must be satisfied that all possibilities of mistaken identity are eliminated. (See **WAZIRI AMANI v R** (1980) TRL 252 (CA). It is one of the guidelines in such cases, that where one claims to have identified a person at night there must be evidence not only that there was light, but also of the source and intensity of that light (See **ISSA s/o MGAYA s/o SHUKA v R** Criminal Appeal No 37 of 2005 (unreported.) This is so, even if the witness purports to recognise the suspect (See **KULWA SO MWAKAJAPE AND TWO OTHERS v R** Criminal Appeal No 35 of 2005 (unreported.)

In the present case, the offence was committed at night and it was dark. A match stick had to be lit to lighten the room. But the intensity and duration of the match stick flame is not disclosed. This, in our view, deals a serious blow in the prosecution case.

With respect, we do not agree with the learned judge on first appeal, that the conditions were ideal for visual identification. On that score, we agree with the trial court and the learned counsel who appeared before us; and allow this ground of appeal.

Next, we go to examine the procedural irregularities. We think, these should not detain us. It is common ground that, in this case, the PF3, was admitted as Exh. P1 without informing the appellant of his rights under Section 240 (3) of the Criminal Procedure Act. Time and again, this Court has said that this omission is fatal, and such medical report so admitted must be expunged. (See **ALFEO VALENTINO v R,** Criminal Appeal No. 92 of 2006 (unreported)) Consequently Exh P1 admitted in this case and acted upon by the trial and the first appellate court, must and is hereby expunged.

The next irregularity is on the conduct of the voire dire examination of PW3 and PW4. We think it is not disputed that PW3 and PW4 were below 14 years of age when they appeared to testify in court. They were therefore children of tender years for the

purposes of section 127 (2) of the Tanzania Evidence Act. That section requires that before taking the evidence of children of tender years, the court must satisfy itself that the child is of sufficient intelligence, knows the duty of speaking the truth, and lastly whether he/she understands the nature of an oath. If the child satisfies, the court on all the three tests, his evidence may be taken on oath or affirmation. If he/she passes only the first two, he may give evidence without oath or affirmation, but if he fails in all or passes only one, such child would not in, our view, be competent to testity. Now, the latest position of the law is that if section 127 (2) of the Evidence Act is not complied with, a conviction based on such evidence may be quashed on appeal unless there is some other evidence to sustain it (See **WILBALD KIMANGANO v R,** Criminal appeal No. 255 of 2007 (unreported)).

We agree that in the present case the voire dire examination of PW3 and PW4 was too short and casual. The trial court, found that both witnesses had only sufficient intelligence, and took their testimonies without affirmation/oath. We think, that was not

sufficient. If it was also satisfied that they also understood the duty of telling the truth the court did not make such a finding. Without such a finding the reception of their evidence was not justified. We agree with learned counsel on this ground too, and allow it.

The remaining ground of appeal is on the sufficiency of the evidence on record. Apart from visual identification, the PF3, the evidence of PW3 and PW4, the first appellate court rested its decision on the credibility of PW1, PW2 and PW6 as well as the appellant's own admission of guilt. Counsel who appeared before us have submitted that the evidence on record is so contradictory and uncreditworthy, that it cannot found a conviction. With greatest respect to the learned counsel, we do not agree.

We say so because, the PF3, the evidence of PW3 and PW4 and visual identification are not the only pieces of evidence that support the appellant's conviction. It is true that the PF3 (Exh.P1) would have supported the commission of the offence. But rape is not proved by medical evidence alone. Some other evidence may also

prove it (See **SHABANI ALLY v R** Criminal Appeal No. 50 of 2001 (unreported). It is also true that, the evidence of PW3 and PW4 is unreliable as it was not taken in strict compliance with section 127(2) of the Evidence Act. Again that would only be beneficial to the appellant if there was no other evidence pointing to his guilt. Similarly, if the only evidence implicating the appellant was entirely that of identification the available evidence of visual identification was not watertight (See **MWALIMU ALLY AND ANOTHER v R** Criminal Appeal No 39 of 1995 (unreported.)

However, in this case we have the testimony of PW1, the victim's mother, who on being informed of the bestial act, examined the victim's private parts and found some bruises. This may not be direct evidence of rape, but it is one string in a chain of circumstantial and other surrounding pieces of evidence. The next strongest chain is the appellant's own words and conduct. According to PW1, PW2 and PW6, the appellant admitted having raped the girl to them and even sought out an amicable settlement.

It is true that some persons to whom PW1 had first reported such as ALLY AZIZ were not called as Mr. Manjoti has submitted, but the prosecution had no duty to call each and every witness to repeat the same thing. In our view, (PW1, PW2 and PW6) gave sufficient evidence of the appellant's admission. His conduct of taking the child to NAUMBU Dispensary was further proof of remorse for his dastardly acts. The admission before PW1 and PW6 who the two courts below believed and we have no reason to disturb that finding; and the appellant's own conduct, in our view, amounted to a confession in law, in terms of section 3(1) (a) of the Evidence Act, which defines a "*confession*" to include:-

> *"words, or conduct or a combination of both words and conduct from which whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person who said the words or did the act or acts constituting the conduct has committed an offence."*

Now, it cannot be gainsaid that, in any criminal trial, the very best of witnesses is an accused person who confesses freely and voluntarily to have committed the offence (See **PAULO MADUKA AND 4 OTHERS v R,** Criminal Appeal No. 110 of 2007 (unreported) **SELEMANI HASSAN v R,** Criminal Appeal No. 364 of 2004 (unreported.) In the present case, there is no indication that the appellant was forced to admit the commission of the offence before PW1, PW2 and PW6, who were steadfast in their testimonies in court, despite the vigorous cross examination that they were subjected to by the appellant on this aspect.

Learned counsel have submitted that there are contradictions and inconsistencies in the testimonies of the prosecution witnesses. We are unable to detect any material contradictions in the record and as observed in **SAID ALLY ISMAIL v R,** Criminal Appeal No. 241 of 2008 (unreported), it is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only if the gist of the evidence is contradictory that the prosecution case will be

dismantled. In the present case, if there were any discrepancies in the prosecution case, they were decisively trampled down by the best evidence, the appellant's own confession, which in our view proved his guilt beyond any reasonable doubt.

It is for the last foregoing reason that we find that the appeal is devoid of substance. It is accordingly dismissed in its entirety.

DATED at MTWARA, this 12th October, 2010.

M.S. MBAROUK
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL