IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPEAL NO. 489 OF 2007

HAMISI SAIDI BUTWE ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Shangali, J.)

dated the 6th day of July, 2007
in
Criminal Appeal No. 149 of 2005

JUDGMENT OF THE COURT

11 & 15 OCTOBER. 2010

MASSATI, J.A.:

Before the District Court of Mtwara at Mtwara, the appellant HAMIS SAID @ BUTWE was charged with the offence of unnatural offence contrary to section 154(1) of the Penal Code (Cap. 16 – R.E. 2002) as amended by the Sexual Offences (Special Provisions) Act No. 4 of 1998. He was convicted and sentenced to the mandatory 30 years imprisonment with four strokes of the cane. His appeal to the

High Court (Shangali, J.) was dismissed in its entirety. Still protesting his innocence, he has filed the present appeal in this Court.

At the trial court, it was alleged that on 28th January, 2005, at about 9.00 pm., recorded music popularly known as "disco" was playing at a certain Mr. Joh's house to celebrate a wedding ceremony. This attracted some youths including PW1, PW2, PW3 and PW4. PW1 (ZABRON SAMWEL) felt like attending to a call of nature. So he went out of the disco hall. Out there, he met the appellant, with other youths. He released himself and went back to the hall. Soon after, the appellant followed him and asked him about his friends, and forced him out of the hall. He led him to a nearby bush by force; and threatened to kill him if he did not oblige him with his desires. He held a knife, slapped and strangled PW1, while he undressed the boy's shorts and underpants and sodomised him. On being released, the boy went home, meeting and informing several persons on the way. His mother had gone to a wedding ceremony the previous night and his father had travelled out of the town. On getting the news, the mother informed one Mlaponi who informed

the boy's grandfather, and so the boy was taken to the police, and later to the hospital. PW1's evidence was supported by PW2, PW3 and PW4. In his defence the appellant informed the court that on an unknown date he and his wife had gone to a wedding ceremony at a friend's place. He left there at 8.00pm., and never left his wife's side again. His defence was supported by his said friend and wife who testified as DW2 and DW3 respectively. He was convinced that the case against him was fabricated by a girl called Jane to whom he owed shs.5,000/= for which he was arrested but knew nothing about the offence facing him. The court believed the prosecution case, and convicted him as shown above.

In this appeal the appellant is fending for himself, and filed three main grounds of appeal, which are:-

(1) That the appellant was not properly identified.

(2) The PF3 was irregularly admitted.

(3) The trial court did not take into consideration the appellant's defence of alibi.

After hearing what the Respondent had to say, the Appellant submitted in elaboration of his grounds of appeal. It was his view that he had given a watertight defence of alibi and therefore the evidence of visual identification by PW1, PW2 and PW4 was not credible. He submitted that in accepting the PF3, the trial court did not inform him of his rights to call and in fact the doctor who prepared it, was not called for cross examination and so he was thereby prejudiced. Then, he analysed the evidence of the prosecution witnesses and argued that it was implausible and contradictory and the courts below should therefore, have found that his alibi managed to raise a reasonable doubt. He prayed that the appeal be allowed.

Mr. Ismail Manjoti, the learned State Attorney, who appeared for the respondent/Republic, supported the conviction. He condensed the grounds of appeal into two groups; first, on procedural irregularities, and the second group, whether the case for the prosecution has been proved beyond reasonable doubt. On the first group, Mr. Manjoti, conceded that the PF3 which was admitted as

Exh. P1 was accepted into evidence without informing the appellant of his right to call the doctor who prepared it for cross examination. He said that this was contrary to section 240(3) of the Criminal Procedure Act, and the legal effect is that such evidence ought to be expunged from the record. The learned counsel submitted that, however, even without the PF3, there was some other credible evidence on record to prove the offence beyond reasonable doubt. There was the evidence of the victim himself (PW1) which was corroborated by PW2 while PW3 and PW4 said they identified the appellant taking the victim (PW1) to the bush. In his view, the case against the appellant had been proved beyond any reasonable doubt and that the appeal lacked merit and so should be dismissed.

In considering this appeal, we shall first deal with procedural irregularities. As correctly pointed out by Mr. Manjoti and the appellant, the PF3 (Exh. P1) was admitted contrary to section 240(3) of the Criminal Procedure Act (Cap. 20 R.E. 2002). That section provides:-

"240(3) when a report referred to in this section is received in evidence, the court may, if it thinks fit, and shall if so required by the accused or his advocate summon and examine or make available for cross examination the person who made the report, and the court shall inform the accused of his right to require that person who made the report to be summoned in accordance with the provisions of this subsection."

In the present case, we have noted two features. The first is that it appears from the record that the appellant had first objected to the production of the PF3. Later the objection is negatived. Let the record speak for itself –

"PW1*....the doctor said I was injured, pray to produce PF3 as Exhibit."*

ACCUSED *– 1 object to the production of PF3 it did not belong to me. No I have no objection.*
COURT *PF 3 admitted as Exh P1".*

Now, we are unable to comprehend how the accused could have "*objected*", and later have "*no objection*" to the production of the PF3. We had expected that on the accused raising an objection, it was the public prosecutor, who would have responded to the objection and then a ruling made by the court. What the trial court did here was not the correct procedure. Secondly, whether or not an accused objects to the production of the PF3, section 240(3) still imposes a duty on the trial court to advise an accused person of his right to call the doctor; and his answer must be recorded. This was not done here. This means, that the PF3 (Exh P1) was irregularly received into evidence. And as rightly submitted by Mr. Manjoti, the PF3 must and is hereby expunged from the record. (See **PROSPER MNJOERA KISA vs REPUBLIC** (Criminal Appeal No 73 of 2003 (C.A.T) **MESSON MTULINGA v REPUBLIC** (Criminal Appeal No 426 of 2006 (C.A.T) **SHABANI ALLY v R** Criminal appeal No. 50 of 2001 **ALFEO**

VALENTINO v R Criminal Appeal No 92 of 2006 (unreported **ISSA HAYIS LIKALAMIKO v R** Criminal Appeal No 125 of 2005 (all unreported.)

Next, we will consider the appellant's defence of alibi about which the appellant bitterly complained for the two courts' failure to consider. According to him, if there were two wedding ceremonies on that night, he participated in one at a different place while, the offence is alleged to have been committed at a different place. As seen above, the appellant's alibi is supported by his witnesses, DW2 and DW3. The trial court dismissed the alibi because *"it was not corroborated"* while the first appellate court treated it as "*nothing but a concocted story...*"

With due respect, we think it is trite law that, in raising a defence of alibi, an accused person assumes no burden of proof. His duty is merely to raise a reasonable doubt. (see **LEONARD ANISETH v R** (1963) E.A. 206 **ALI SALEHE MSITU v R** (1980) TRL.1. So it is a misdirection to expect some "corroboration" from

the appellant, let alone any proof of alibi. What both courts below ought to have done (if they decided to take cognizance of the appellant's defence of alibi,) was to subject his defence to a critical analysis against the prosecution case and see if it created any reasonable doubt; because even if it was proved to be false the task of proving the appellant's guilt was not accomplished. (See **ALLY AMSI v R** Criminal Appeal No 117 of 1991 (unreported). We will now do, what the lower courts ought to have done; that is critically analyse the appellant's defence of alibi.

The prosecution's case was that, the offence was committed on 28/1/2005, at 9.00pm. In his defence, the appellant claimed to have attended a wedding on a date he could not remember. Even his wife (DW2) did not remember the date; but even stranger still, even the host DW3 who wedded, did not remember the date. We find it an odd coincidence, and rather implausible for a newly wed to have forgotten his wedding day between January 2005 and July 2005 when DW3 gave his testimony in court. Secondly, according to PW5, by 30/1/2005 when he went to draw the sketch map of the scene of

crime the appellant had already been arrested and in custody. He was arrested on the second day after the commission of the offence. And this is borne out by the record. He first appeared in court on 1/2/2005. But DW2, (his wife), told the court that he was arrested on 7/2/2005. In cross examination she claims, the appellant was arrested after two weeks. We are certain that this part of DW2's testimony about the appellant's day of arrest is nothing but a deliberate lie. Thirdly, according to DW3 the marriage ceremony was conducted in two days, and on the first day, the appellant left at 8.00 pm. Later, he (DW3) heard that the appellant had been arrested for sodomy. If that was the day where date the appellant had "forgotten" and the offence was committed at 9.00 pm, and the appellant left at 8.00 pm., it was not inconsistent with the prosecution case. So on the whole, we think, the defence of alibi raised by the appellant did not raise any reasonable doubt on the prosecution case.

We are thus left with the general ground of appeal, which rotates on the issues of visual identification and credibility. On visual

identification it is trite law that, for a court to rely on such evidence the evidence must be watertight with no possibility of mistaken identity (See **WAZIRI AMANI v R** (1980) TRL 250.) On the question of credibility, it must be borne in mind that, we are sitting in a second appeal. It is a prudent rule of practice, that in such circumstances an appellate court should be slow to disturb concurrent findings of fact, made by lower courts unless it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or procedure (See **SALUM MHANDO v R** (1993), TLR. 170, **DR PANDYA v R** (1957) E.A. 336, **DPP v JAFARI MFAUME KAWAWA** (1981) TRL. 149. In the present case the two courts below found that PW1, PW2, PW3 and PW4 were credible witnesses. The trial court observed the demeanor of PW1 as he testified in court amidst sobs and believed PW2 and PW3 as credible because they were also sexually harassed by the appellant before PW1 appeared. The trial court was also satisfied that the appellant was sufficiently identified by PW1, PW2, PW3 and PW4 who knew the appellant before. We are also satisfied that at the improvised discotheque hall there was

sufficient electric light to enable PW2 and PW3 see the appellant taking PW1 away into the bush.

When all the prosecution evidence is put together, and the defence of alibi considered along, we are satisfied that, the guilt of the appellant has been proved beyond any reasonable doubt. The conviction and sentence are well earned. The appeal is therefore dismissed in its entirety.

DATED at MTWARA, this 15th 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