IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: NSEKELA, J.A., MJASIRI, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 295 OF 2008

MARCO AMSI @MIKIDAD

AND TWO OTHERS ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Sambo, J.)

dated the 6th day of August, 2008
in
DC Criminal Appeal No. 40 of 2007

JUDGMENT OF THE COURT

29th Sept. & 7th October, 2011

MJASIRI, J.A.

In the District Court of Monduli, the appellants, Marco Amsi @ Mikidadi, Ramadhani Swedi and Salanda Bunge were charged and convicted of the offence of rape contrary to **Sections 130(1)** and **(2)** and **131 (1)** and **(3)** of the Penal Code Cap 16, R.E. 2002 as amended by the Sexual Offences Special Provisions Act (Act No. 4 of

1998) on the first count and unnatural offence contrary to **Section 154 (1)** of the Penal Code (hereinafter "the Penal Code") on the second count. Each of the appellant was sentenced to 30 years imprisonment on each count. The sentences were to run concurrently.

Being aggrieved by the decision of the District Court, they appealed to the High Court against both conviction and sentence. Their appeals to the High Court were unsuccessful, hence this second appeal to this Court.

The circumstances which led to the conviction of the appellants were as follows. The appellants and the complainant (PW1), Veronica Aquesso were all residents of Magadini Mto wa Mbu. On the date of the incident PW1 went to a local Bar known as 'Sangasanga bar' in the vicinity accompanied by the first appellant Marco Amsi. While they were at the bar, the 2nd and 3rd appellants also came to the bar. According to PW1 when she ordered a drink the 2nd and the 3rd appellants grabbed it. She left for home in the company of the 1st

appellant. While on the way home she was accosted by the 2nd and 3rd appellants and one Michael who is not in Court. She was slapped and butted on the head. She fell down and was carried by the three appellants to a near by bush near a river where all the appellants took turns to rape and sodomise her including the 1st appellant. The 1st appellant was the one who removed her underwear. The appellants denied committing the offence. PW1 was severely injured and traumatized. She lost consciousness after undergoing this ordeal and was hospitalized.

The appellants filed separate Memoranda of appeal. However their grounds of appeal were similar in nature save for one ground of appeal which was raised only by the 1st appellant. The appellants also filed written submissions.

The 1st appellant complained that the *'trial Magistrate did not explain to him about his rights to present his defence and the consequences of remaining silent'*. The common grounds of appeal to all the appellants are hereby summarized as under.

1. ***Section 240 (3)*** *of the Criminal Procedure Act was not complied with.*
2. *The appellants were not properly identified.*
3. *The conviction of the appellants was against the weight of the evidence.*

In this appeal all the three appellants appeared in person and were unrepresented. The respondent Republic was represented by Mr. Ponziano Lukosi, learned State Attorney.

At the hearing of the appeal Mr. Lukosi supported the conviction. In relation to the complaint raised by the 1st appellant that he was not advised of his rights to present his defence, Mr. Lukosi submitted that the complaint had no basis. According to the record, the appellant was advised of his right to present his defence. However the appellant opted to remain silent.

On the non – compliance with **Section 240 (3)** of the Criminal Procedure Act, Cap 20 R.E. 2002 (hereinafter "the Criminal Procedure Act",) Mr. Lukosi readily conceded that that the appellants were not

advised of their right to have the doctor called as a witness in order to give them an opportunity to cross examine the doctor. He submitted that even if the PF.3 is expunged from the record there was sufficient evidence to convict the appellants of the offence of rape.

Concerning the issue of identification, Mr. Lukosi submitted that the appellants were properly identified. All the appellants were well known to PW1. All of them were drinking at the same joint. The first appellant had accompanied PW1 to the bar and they also left together. PW1 was not drunk and therefore had a good recollection of what had transpired. She clearly identified all the appellants. She only lost consciousness after the harrowing experience she had. She did not lose her memory. He made reference to the case of **Eva Salingo v. R** [1994] TLR 220.

In relation to the complaint raised by the 1st appellant on the failure by the Court to advise him on his right to present his defence, we are satisfied that this ground has no basis whatsoever. Looking at the record it is very clear that all the appellants were advised of their

rights. The relevant part of the record (page 24) is reproduced as under:

" ***Pros***: *I now request defence*

Court: DEFENCE HEARING

Court: *Accuseds informed of their rights.*

2nd accused: *I have nothing to say, I will keep quiet.*

4th accused: *I shall give my defence on oath.*

5th accused: *I shall give my defence on oath.*

Court: *Defence of 2nd Accused DW1 is closed.*

On the non-compliance with **Section 240 (3)** of the Criminal Procedure Act, we entirely agree with the appellants that the requirements under **Section 240 (3)** were not met. The appellants were not informed of their right to have the doctor called to testify in Court in order to give them the opportunity to cross examine him on the PF.3 report. The PF.3 report cannot therefore be acted upon. (See **Kashana Buyoka v R**, Criminal Appeal No. 176 of 2004; **Sultan Mohamed v R**, Criminal Appeal No. 176 of 2003 and **Nyambaya Kamuoga v R**, Criminal Appeal No. 90 of 2003.) The learned State

Attorney has conceded to this anomaly. The PF.3 report is hereby expunged from the record.

The central issue for consideration in this appeal is whether or not the complainant was raped and sodomised and whether or not it was the appellants who committed the said offences. After carefully reviewing the evidence on record and the submissions made by Mr. Lukosi and the appellants, we are satisfied that there is sufficient evidence to prove that PW1 was raped and that it was the appellants who committed the rape. There is overwhelming evidence against the appellants. The appellants were well known to PW1. PW1 left the bar in the company of the 1st appellant. They met the other two appellants on the way. PW1 narrated the sequence of events and provided horrifying details of what had taken place. PW1 stated in her evidence that she was not drunk when she left the bar with 1st appellant, this fact was supported by the evidence of PW2, the owner of the bar.

The only evidence linking the appellants with the offence of rape is that of PW1, a single witness. As provided under **Section 143** of the Evidence Act, Cap 6, R.E. 2002 no particular number of witnesses

is required for the proof of any fact. What is important is the witness's opportunity to see what she claims to have seen and her credibility. See: **Yohanis Msigwa v R** [1990] TLR 148 (CA). The appellants were well known to PW1 and they had spent a considerable period of time together. (See: **Samwel Silanga v R** [1993] TLR 149; **Rajabu Katumbo v. R** (1994) TLR 129 and **Eva Salingo** and **Two Others v. R** (1995) TLR 220.

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

> *"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 witness passed the test of reliability in basing conviction on his testimony alone."*

In **Abdullah bin Wendo v R** [1953] 20 EACA 116 though identification of the appellant was by a single witness, it was confirmed that a fact may be proved by a single witness. Again in **Roria v Republic** [1967] EA 833 where the Court held thus:-

> ***"While it is legally possible to convict on the uncorroborated evidence of a single witness identifying***

an accused and connecting him with the offence*, in the circumstances of this case it was not safe to do so.*

(Emphasis ours)

In **Rotich Kipsongo v R** [2008] eKLR, the Court of Appeal in Kenya had the occasion to revisit the issue of identification by recognition. The Court made reference to the case of **Kenga Chea Thoya v R**, Criminal Appeal No. 375 of 2006 (unreported) where it said:-

> *"Our own re-evaluation of the evidence, we find this to be a straight forward case in which the appellant was recognized by the witnesses (PW1) who knew him. This was clearly a case of recognition rather than identification and as it has been observed severally by this Court, recognition is more satisfactory more reassuring and more reliable than identification of a stranger. See:* ***Anjononi v Republic*** *[1980] KLR 59.*

We have no doubt in our minds that the identification of the appellants in this case was through recognition and was not an identification by a stranger. The circumstances of this case are

different from those prevailing in **Raymond Francis v R** [1994] TLR 100, where the appellants were seeing the witnesses for the first time.

The best evidence of sexual offences come from the victim. See for instance, **Selemani Makunge v R**, Criminal Appeal No. 94 of 1999 and **Ramadhani Samo v Republic**, Criminal Appeal No. 17 of 2008 (both unreported).

This is a second appeal. Whereas an appellate Court has jurisdiction to review the evidence to determine whether the conclusion of the trial Court should stand, this jurisdiction is to be exercised with caution where there is no evidence to support a particular conclusion. See: **Peter v. Sunday Post**, 1958 EA 424; **Okeno v. R** 1972 EA 32 and the **Director of Public Prosecutions v Jaffari Mfaume Kawawa** [1981] TLR 143.

Given the circumstances, we are inclined to agree with the learned State Attorney that the offence of rape and the offence against the order of nature have been proved beyond reasonable doubt. We would also like to state that according to the evidence on record the

offence committed by the appellants is that of gang rape contrary to **Section 131 A** of the Penal Code as the offence was committed by one or more person, in a group of persons. The relevant section provides as follows:

> "*(1) Where the offence of rape is committed by one or more persons in a group of persons, each person in the group committing or abetting the commission of the offence is deemed to have committed gang rape.*
>
> *(2) Every person who is convicted of gang rape shall be sentenced to imprisonment for life, regardless of the actual role he played in the rape".*

Given the status of the evidence of PW1, we are satisfied that such evidence is sufficient to establish the guilt of the appellant for the offence of gang rape contrary to **Section 131 A** of the Penal Code and can therefore be relied upon.

In the case of **Herman Henjewele v Republic**, Criminal Appeal No.164 of 2005, the appellant was supposed to be given a sentence of life imprisonment, as the victim was a child under 10 years but was instead sentenced to 30 years. This factor was over looked by both the trial Court as well as the High Court. The Court stated as follows:-

"Although the Director of Public Prosecutions did not appeal against the sentence, this Court will not allow the illegal sentence to stand, having been aware of the illegality".

The Court invoked its revisional powers under **Section 4(2)** of the Appellate Jurisdiction, Act 1979 as amended by Act No. 17 of 1993 (hereinafter "the Act") to quash the sentence of 30 years imprisonment and substituted thereof the correct sentence of life imprisonment. See also **Ramadhani Sango v Republic**, Criminal Appeal No. 175 of 2008 CA (unreported).

In view of the prevailing circumstances we hereby invoke the revisional powers of this Court under **Section 4(2)** of the Act to quash the conviction of rape and the sentence of 30 years imprisonment and substitute thereof the conviction of gang rape contrary to **Section 131 A** of the Penal Code and the appropriate sentence of life imprisonment.

For the foregoing reasons, we are satisfied that there was sufficient evidence to warrant the appellant's conviction. Save for the substitution of the conviction of rape with that of gang rape, and the

revision of sentence to life imprisonment the appeal is hereby dismissed.

DATED at ARUSHA this 6th day of October, 2011.

H.R. NSEKELA
JUSTICEOF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL