IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: RUTAKANGWA, J.A., ORIYO, J.A., And MMILLA, J.A.)

CRIMINAL APPEAL NO. 112 OF 2006

JAFARI MOHAMED ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the
High Court of Tanzania at Dodoma)

(Kaijage, J.)

dated the 21st day of February, 2006
in
Criminal Appeal No. 15 of 2000

JUDGMENT OF THE COURT

12th & 15th March, 2013

RUTAKANGWA, J.A.:

The appellant together with one Tofique Hamisi, who jumped bail after testifying in his defence, were convicted by the Iramba District court (the trial court) of the offence of Gang Rape. They were then each sentenced to life imprisonment plus 12 strokes of the cane. In addition, they were each ordered to pay Tshs. 200,000/= to the rape victim, one PW1 Penina John, as compensation.

The prosecution case against the appellant and Tofique, was predicated on the evidence of PW1 Penina, PW2 Victoria Lyanga and PW3 Inspector Abubakar Lue. This evidence was briefly as follows:-

As of 7th July, 1999, PW1 Penina was a form IV student at Badri Secondary School in Nzega District. PW2 Victoria was a resident of Shelui Minor Settlement and a petty businesswoman running a soft and hard drinks kiosk thereat. PW3 Abubakar, was an Inspector of Police and the O.C.S. of Shelui Police Post.

On that day, PW1 Penina arrived at Shelui in the morning (9.00 hrs.) from Kiomboi on her way back to school. While looking for transport to Nzega, she rested at PW2 Victoria's kiosk. The two had in the past lived together in Nzega. As by 9.30 p.m. PW1 Penina had not yet secured transport, PW2 Victoria invited her to spend the night at her home. PW1 Penina agreed.

As the couple was leaving the kiosk, they were set on by a street gang who instantly began to physically assault PW1 Penina. The couple rushed back to the kiosk, but they were pursued there. PW1 Penina

was dragged out of the kiosk and whisked away, despite PW2 Victoria's frantic struggles to rescue her. PW2 Victoria rushed to Shelui Police post where she reported the incident. According to the evidence of PW2 Victoria the assaillants included the appellant (who was the one who actually grabbed and assaulted PW1 Penina), Tofique and one Hamza. The three, being residents of Shelui, were well known to PW2 Victoria.

The marauders took PW1 Penina to the house of Tofique. Inside the house there was light coming from a burning wick lamp. Hamza undressed himself and then ordered PW1 Penina to undress. PW1 Penina refused. Hamza picked up a knife from a table and threatened to stab her if she resisted. PW1 Penina remained adamant, whereupon Hamza used force to undress her. He threw her on a bed and sexually knew her against her consent. Ten minutes later the appellant pushed off Hamza and he, too, carnally knew her against her consent, while Tofique was looking on.

PW1 Penina unequivocally told the trial court that each rapist inserted his penis into her Vagina. The rapists abandoned her after Tofique's young brother entered the house. She then left the scene on

her own and went to PW2 Victoria's residence from where she was later, that night, picked up by PW3 Insp. Abubakar and taken to the Police Post to record her statement. As the appellant had already been arrested by PW3 Insp. Abubakar following PW2 Victoria's report, PW1 Penina easily recognised him as one of the rapists. While Hamza escaped the very right after being unsuccessfully pursued by PW3, Tofique was arrested the following morning. The two were accordingly charged with raping PW1 Penina.

The appellant and Tofique denied raping PW1 Penina. The two had indicated that they had defence witnesses to call. When the trial was adjourned to enable them secure their witnesses, Tofique jumped bail. After a number of adjournments, the appellant changed his mind and closed his case without calling any witness.

In a well reasoned out judgment, the learned trial Principal District Magistrate, found the three prosecution witnesses to be witnesses of truth. From that premise he not only found and held that PW1 Penina was raped on the night of 7th July, 1999, but also that she was raped by the appellant and Hamza, that is gang-raped. It was his conclusive

finding that both PW1 Penina and PW2 Victoria could not have been mistaken in their identification of the appellant as one of the street gang who assaulted and eventually gang-raped PW1 Penina, because the gang was well known to PW2 Victoria. On the basis of these findings of fact, the appellant and Tofique were accordingly convicted and sentenced.

The appellant was aggrieved. He appealed to the High Court against the conviction and sentences. His memorandum of appeal to the High Court listed only three (3) grievances against the decision of the trial court, which the High Court was called upon to resolve in his favour. Briefly, the appellant was reproaching the learned trial Principal District Magistrate with:-

(a) Misdirecting himself in holding that he was impeccably identified by both PW1 Penina and PW2 Victoria;

(b) Not holding that there was no evidence connecting him with the rape of PW1 Penina, and

(c) Not holding that his evidence was the more probable than that of PW1 Penina.

In his considered judgment, the learned first appellate judge found the appeal wanting in merit. He found and held, quite correctly, that the fact that PW1 Penina had been gang-raped was not disputed. Upon a full evaluation of PW2 Victoria's evidence, he, like the trial magistrate, conclusively held that she could not have been mistaken in her identification of the appellant. He predicated this finding on these three undisputed facts. One, the appellant, Hamza and Tofique were not strangers to her. Two, the kiosk's vicinity was well illuminated by light from a hurricane lamp. Three, she had ample time with the assailants, to enable her to unmistakably recognise them.

Concerning PW1 Penina, the learned appellate judge was satisfied by the facts that the two scenes (the kiosk and Tofique's room) were well lit and she stayed a long time with the appellant. He accordingly, dismissed the three grounds of appeal and, therefore, the appeal in its entirety.

Dissatisfied with the dismissal of his appeal, the appellant instituted this appeal. The memorandum of appeal contains a discursive litany of complaints, which raise new matters not considered by the two courts

below. In all, it has 10 grounds of complaint. In short, he is complaining that he was wrongly convicted because:-

(a) No direct evidence was presented at his trial connecting him with the alleged rape;

(b) The visual identification evidence of PW1 and PW2 was very weak and as such had no probative value;

(c) His defence case was not considered;

(d) Essential witnesses were not called by the prosecution;

(e) No identification parade was held;

(f) PW1 Penina was not immediately sent to hospital which was 20 paces from the Police post;

(g) PW1 Penina and PW2 Victoria recorded their statements to the police after they had been shown the appellant at the police post; and

(h) PW1 Penina's PF3 (exh P1) showed that no sperms were found in her vagina, which showed no bruises either.

To prosecute the appeal, the appellant appeared before us in person. He opted to adopt the grounds of appeal and had nothing to say in elaboration.

Mr. Godfrey Wambali, learned State Attorney, appeared for the respondent Republic. He urged us to dismiss the appeal in its entirety. He took this stand because the visual identification evidence of both PW1 Penina and PW2 Victoria, who were found to be credible witnesses by both courts below, was impeccable and watertight. The truthful evidence of PW1 Penina, he argued, proved not only every ingredient of the offence of rape, but also the offence of gang rape. In response, the appellant repeated his protestations of innocence arguing that PW1 Penina could not have been raped by three people and escape without any injuries.

We have found it convenient to begin our discussion by disposing of first the grounds of complaint listed (c) to (h) above. We have done so because these complaints are being improperly raised for the first time in this Court. For this reason, being issues of fact, their determination

does not fall within our jurisdiction in an appeal of this nature – see Section 6 (7) (a) of the Appellate Jurisdiction Act, Cap. 141.

We take it to be settled law, which we are not inclined to depart from, that "this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal..." per the Court in **Elias Msaki v. Yesaya Ntateu Matee,** Civil Application No. 2 of 1982 (ARS). See, also **Richard s/o Mgaya @ Sikubali Mgaya v R.**, Criminal Appeal No. 335 of 2008 (both unreported). The logic behind this should be obvious. This Court is conferred with jurisdiction to hear appeals from or revise proceedings or decisions by the High Court in the exercise of its original, appellate or revisional and/or review jurisdictions. We cannot, therefore, competently render a decision on any issue which was never decided by the High Court.

The above clear stance of the law notwithstanding, we wish to observe in passing that these enumerated complaints have been raised without any good cause. They have no factual basis. First of all it is clear to us that an identification parade would have had no impact

because the appellant and his fellows were not strangers to PW2 Victoria, from whose custody they had abducted PW1 Penina. Secondly, there is no evidence on record to show that there was a hospital of whatever description within the vicinity of the police post to where PW1 Penina would have been sent that very night. If the appellant thought this to be very crucial he would have raised it in his cross-examination of the prosecution witnesses and/or in his short evidence. Thirdly, from the evidence of both PW2 Victoria and PW3 Insp. Abubakar, PW2 Victoria reported the incident to the police immediately and mentioned the appellant, leading to his instant arrest that night. For these reasons, we have no hesitation in dismissing these grounds of appeal.

The complaint that the courts below never considered his defence case, also being raised for the first time here, lacks merit. In the High Court his complaint was that the trial court erred in preferring the version of PW1 Penina to that of his. In his judgment, the learned first appellate judge held, and we take the liberty to partly quote him:-

> *"**In my own reassment and re-evaluation of the evidence on record** I have also found, without merit, the contention put forward by the appellant*

that PW1 did not know if the former raped her."
[Emphasis is ours]

All this goes to show that the two courts below considered the appellant's defence but rejected it in view of the strong prosecution case based on the truthful evidence of PW1 Penina, PW2 Victoria and PW3 Insp. Abubakar. Indeed, we have carefully studied the evidence of PW1 Penina and we could not glean therefrom a word, let alone a sentence, from her evidence to the effect that she said, that "she did not know if the appellant raped her." We think this was a figment of the appellant's our imagination. The fact that the appellant's evidence was rejected, does not mean that it was not considered.

Coming to the first ground of complaint, we have no inhibition in holding that it is based on a misconception. We are saying so deliberately because no better direct evidence could have been produced by the prosecution to prove the alleged gang rape than that of PW1 Penina, an adult victim of the offence, as Mr. Wambali correctly argued before us. She graphically explained, how the appellant and Hamza raped her in turns. This is how she put it:-

> *"Hamza lied (sic) on top of me and inserted his penis in my vagina and it penetrated. He sexually assaulted me for about 10 minutes. After that Jafari (1st accused) and 2nd accused came pushed the door... He abused Hamza saying why he was not emitting. The 1st accused removed Hamza from me. He undressed his white T-shirt... and an underwear and lied (sic) on top of me and took his penis and inserted into my vagina. It penetrated. He took about 10 minutes to assault me sexually..."*

We could not have expected a more paralyzingly compelling direct evidence to prove the gang rape, (all things being equal,) than this piece of evidence. At most, the appellant could only challenge this evidence from the aspect of credibility which we think is the thrust of ground (b) of complaint above. We accordingly dismiss the first ground of appeal.

The two courts below, as already shown, found the three prosecution witnesses to be credible. It is trite law that credibility is an issue of fact, and the trial magistrate or judge is the best judge of this fact. An appellate court, like this one, will only interfere with such concurrent findings of fact only if it is satisfied that "they are on the face of it unreasonable or perverse" leading to a miscarriage of justice, or

there had been a misapprehension of the evidence or a violation of some principle of law: see, for instance, **Peters v Sunday Post Ltd.** [1958] E.A. 424: **Daniel Nguru and Four Others V.R.,** Criminal Appeal No. 178 of 2004, (unreported); **Richard Mgaya** (supra), etc.

In his analysis of the identifying witnesses' evidence, the learned trial Principal Resident Magistrate said:

> *"The accused persons were seen by PW2 who knew the accused persons for a long time dragging away PW1 after they had assaulted PW1. PW2 followed the accused persons but she was threatened by the 1st accused so PW2 decided to go and report at Shelui Police Post..."*

We should as well mention here that the appellant was the 1st accused at their trial.

Regarding PW1 Penina, she said:-

> *"PW1 could not have mistaken the accused persons who had first assaulted her on the way, and at PW2's kiosk. The time the accused persons stayed in the 2nd accused house which was lit with a wick lamp was enough to identify the accused persons unmistakenly.*

...The fact that PW1 went to PW2's crying after she was sexually assaulted negative consent."

In our considered opinion, and with unfeigned respect to the appellant, we have found no legal flaw in this reasoning. Once the learned trial P.D.M had found PW1 and PW2 to be truthful witnesses, a finding of fact within his province which was upheld by the first learned appellate judge, we have found it very difficult on our part to interfere with this impeccable finding. Neither the bare denial of the appellant in his defence nor his grounds of appeal before us, have raised any material issue of fact or law which could be used as a peg to discredit the two prosecution witnesses.

It is our respectful finding, therefore, that the two courts below properly directed themselves on the issue of identification evidence and the legal burden of proof. This being a second appeal we are only concerned with issues of law. The appellant has totally failed to demonstrate an error of law committed by the two courts below in the conduct and determination of his trial and/or appeal which would have justified our interference with their concurrent findings of fact, in view of

the fact that the appellant does not dispute or doubt, PW1 to have been gang-raped on the night of 7th July, 1999.

For this reason we have found ourselves unable to fault the concurrent findings of fact of the two courts below regarding the credibility of PW1 Penina and PW2 Victoria and as a corollary the impeccability of their visual identification and/or recognition evidence. We accordingly find no merit in the second ground of complaint and we dismiss it.

In view of our above holding, we are constrained to observe in passing that failure to call as a witness Tofique's brother did not prejudice the appellant at all. The appellant had every right and was given every opportunity to call any witness to discredit the three prosecution witnesses if he sincerely believed that they had not told the truth. He did not do so. His evidence alone did not raise any reasonable doubt on the credibility of PW1 Penina, PW2 Victoria and PW3 Insp. Abubakar. We, accordingly hold without any demur that the appellant was part of the street gang marauders who assaulted, abducted and raped PW1 Penina. He was properly convicted and sentenced.

In fine, we find this appeal without merit and dismiss it in its entirety.

DATED at **DODOMA** this 13th day of March, 2013

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

E.M.K. MMILLA
JUSTICE OF APPEAL

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

Malewo M.A.
DEPUTY REGISTRAR
COURT OF APPEAL