IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: RUTAKANGWA, J.A., KIMARO,J.A., And LUANDA, J.A.)

CRIMINAL APPEAL NO.353 OF 2014

MALIK GEORGE NGENDAKUMANA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Bukoba)

(Khaday J.)

dated 11th September, 2014

in

Criminal Appeal No. 70 of 2014

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JUDGMENT OF THE COURT

20th & 24th February, 2015

KIMARO, J.A.

The District Court of Ngara convicted the appellant of the offence of rape contrary to sections 130 (1) (2) (b) and 131 of the Penal Code [CAP 16 R.E.2002] and imposed on him a sentence of 30 years imprisonment. Aggrieved by the conviction and the sentence the appellant filed an appeal in the High Court which was dismissed.

The evidence upon which the conviction of the appellant was grounded is not hard to grasp. On 28th January, 2001 at around 7.15 p.m. the complainant and the victim of the crime, Jenipha Japhet (PW1) a resident of Murukuluzo village, was walking home. She had come from Nyakiziba where she had gone to visit her sister. She was walking along Nyamigwezo road. She was carrying a bunch of banana on her head.

As she was walking she heard footsteps behind her. She turned back to see who was behind her and she saw a person she claimed to be the appellant running towards her. He had a "*panga.*" When the appellant approached the complainant, he held her and pushed down the bananas she was carrying. The bunch of bananas the complainant was carrying fell down. The appellant then held the complainant by her neck, fell her down pulled her gown upwards, tore her underwear, then he undressed his pit shorts and had sexual intercourse with her against her will. According to PW1 the appellant inserted his penis in her vagina. The complainant wanted to shout for help but the appellant threatened to cut her with the "*panga*" he had. It was after the appellant ejaculated and left, that she

shouted for help. Before the appellant left he cut the complainant's finger with the "*panga*."

When the appellant shouted for help two people, the first one being Miburo who did not testify, responded to the alarm raised. Upon arrival at the scene of crime, Mibiro also shouted and Stanford Ntamavyolilo (PW2) went to the scene of crime where he found the complainant and Miburo. His testimony was that he knows both the appellant and the complainant. PW2 was the ten cell leader of the area in which the offence was committed. It was then the complainant reported the rape incident to him mentioning the appellant as the one who raped her. PW2 testified also to have seen the complainant with an injured finger and her clothes being dirty with mud.

With this evidence the appellant was then charged with the offence of rape. The defence of the appellant was that he did not commit the offence. He was charged because of grudges between him and the complainant. The source of the grudge was that he had once arrested the

husband of the complainant for staying in the country without a permit. He was a foreigner, a Rwandese.

The trial magistrate was satisfied, after the evaluation of the evidence given by both the prosecution and the defence to have proved the offence of rape.

The first appellate court sustained the conviction and the sentence that was imposed on the appellant because the learned judge was satisfied with the evidence that was led in the trial that the appellant and the complainant were known to each other before as they resided in the same village. She found the defence of the appellant having grudge with the complainant being an afterthought. In her opinion the complainant was a credible witness, and her evidence proved that indeed rape was committed on her and it was the appellant who committed it.

In this Court the appellant's grounds of appeal are mainly two. The first is his identification at the scene of crime and the second is the credibility of PW1.

The appellant appeared before the Court in person when the appeal was called on for the hearing. He did not have any additional grounds of appeal. He requested the Court to allow the appeal because he was wrongly convicted.

Ms. Grace Komba, learned State Attorney appeared to defend the respondent. She supported the appeal. Her focus of submission was on the ground of identification. She said the evidence of the identification of the appellant at the scene of crime was not watertight. She faulted the learned judge on first appeal on the issue of identification of the appellant that it was unmistaken. She said that the complainant did not lead evidence at all showing how she identified the appellant. She referred the Court to section 5 of the Penal Code which defines the night time and said that since in the charge sheet it is shown that the offence was committed

at 19.15 hours, it was pertinent for the complainant to mention the circumstances which enabled her to identify the appellant. Her evidence that the appellant was known to her before and they resided in the same village was not sufficient. He referred the Court to the case of **Malio Mteming'ombe& 2 others V R** Criminal Appeal No.128 of 2010 CAT Mbeya Registry (unreported) to support her submissions on this ground of appeal. She then prayed that the appeal be allowed.

The principal of law is that in criminal cases the duty of the prosecution is twofold. One, to prove that the offence was committed, and two, that the accused person is the one who committed it. In this appeal there was no doubt in the evidence of the prosecution that the complainant was raped. PW1 the complainant, testified that the rapist' penis penetrated her vagina and the rapist reached a point of ejaculation. See section 130 (4) of the Penal Code [Cap 16 R.E.2002] and the cases of **Selemani Makumba V R** Criminal appeal No. 94 of 1999, **Mathayo Ngalya @ Shabani V R** Criminal Appeal No.170 of 2006, **Alfeo Valentino v R** Criminal Appeal No. 92 of 2006 and **Ally Mlawa V R** Criminal Appeal No. 77 of 2007(all unreported). All these cases show that

the offence of rape is committed when the essential ingredient is proved and that is the penetration of the penis into the vagina.

The issue that was in contest between the parties in the High Court was that of identification. The question was whether the appellant was identified as being the person who raped Jevina d/o Japhet, PW1. In cases involving contest in visual identification this Court has in its several authorities said that the evidence should leave no doubt that the appellant was correctly identified. In other words no mistake whatsoever should be made in identifying the person who is alleged to have committed the offence he/she is charged with. This means that the identifying witness should clearly show the circumstances which enabled him/her to identify the accused person. The case of **Waziri Amani V R** [1980] T.L.R. 200 highlights factors necessary to show the court that the witness could not have mistaken the identity of the person who committed the offence. The witness must show where the offence was committed, the surrounding of the place where the offence was committed, the time of the commission of the offence, the source of light and its intensity at the time and place where the offence was committed, how the offence was committed and all

other factors necessary to enable the court to make a finding that the witness made a correct identification of the accused.

We entirely agree with the learned State Attorney that the complainant PW1 did not lead evidence at all showing what enabled her to identify the appellant. The only evidence led to connect the appellant with the commission of the offence was that:

> " *I know the accused very well. He is my village mate and we are living in the same ten leadership. I remember on 28th at 7.15pm I was on my way back home coming from Nyakiziba where I had gone to visit my sister then I heard the footsteps behind when I turned back I saw the accused coming to me. He had a "panga" in his hand..."*

The witness then went on to explain how the rape took place. Obviously the complaint's evidence as it stands does not at all show factors

which enabled her to identify the appellant. It leaves doubt as to whether she is talking of the Malick George @ Ngendakumana who was living in the same village with her or it was another person mistake with the Malik she knew as a village mate. She said the offence was committed at 7.15 pm but she did not say whether at that time there was still light sufficient to correctly identify the appellant. Another shortfall noted in the evidence of the witness PW1 is that she did not say where the offence took place. The other prosecution witness did not give evidence of identification.

In the case of **Malio Mteming'ombe** (supra) the issue of identification arose. In that case the offence was committed in a house at about 02.00 hours while the victim was asleep. The room of the complainant was about two and half meters wide. What assisted her to identify the assailants was a lamp (taa ya chemli). In solving the issue of identification the Court held as follows:

"*On close scrutiny of the totality of the evidence, we*

are of the considered view that PW1's evidence of visual identification was not free from serious misgivings and had not erased all possibilities of mistaken identification."

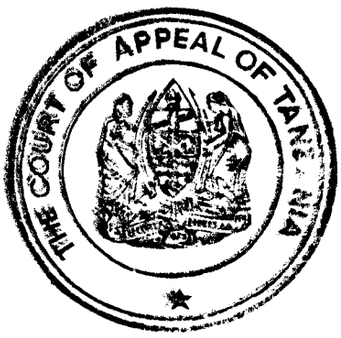
The Court arrived at that finding after considering how the witness responded to the questions that arose in cross-examination In her evidence she had said that it was the first appellant who ordered her to put the lamp on. However, this evidence was contradicted by another witness, a police investigator who testified that upon the complainant making a report to the police, she informed her that the lamp was on because she had a new baby. The witness had not even indicated the intensity of the lamp.

From the evidence that was given by Jenipha Japhet (PW1) who complained of being raped by Malik George @ Ngendakumana, the appellant, it is obvious that no undoubted/impeccable evidence of identification of the appellant was at all made. This means the prosecution did not fulfil the second limb of their duty in establishing who committed the offence of rape against Jenipha Japhet. She did not say how she

identified Malick George @ Ngendakumana. Given that shortfall, the appeal by the appellant is allowed, the conviction is quashed and the sentence is set aside. The appellant should be released from prison unless held there for any other lawful reason.

DATED at BUKOBA this 23rd day of February 2015.

E.M.K.RUTAKANGWA
JUSTICE OF APPEAL



N.P.KIMARO
JUSTICE OF APPEAL

B.M.LUANDA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL