

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**



(CORAM: LUBUVA, J.A., MROSO, J.A., And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 178 OF 2004

1. DANIEL NGURU
2. HAMAD MOHAMED LYAMBAKA
3. HUSSEIN KYAMBA NYAWAYA
4. ABDALLAH SOSPETER MABOMBA
5. NYEGINI ALEX

..... APPELLANTS

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the High
Court of Tanzania at Mwanza)**

(Mchome, J.)

**dated the 2nd day of July, 2004
in**

HC Criminal Appeal Nos. 4, 5, 6, 7, 8 of 2003

JUDGEMENT OF THE COURT

26 February & 16 March 2007

RUTAKANGWA, J.A.:

The five appellants were jointly and together charged before the District Court of Musoma with two counts. These were: Armed robbery c/ss 285 and 286 of the Penal Code and gang rape c/s 131A (1) and (2) of the Penal Code. The offences were alleged to have been committed at or about 22.45 hours on 27th December, 1999 at

Ryamgabo Village Musoma District while the offenders were armed with a sub-machine gun.

The appellants denied the charges. Four witnesses, namely Mkiryia Ibogo (PW1), Nyakuzira Mkiryia (PW2), Mstapha Imesho (PW3) and Jastine Kitoki (PW4) testified for the prosecution. The appellants were convicted as charged on both counts. Each one was sentenced to thirty (30) years imprisonment on the count of armed robbery and life imprisonment on the rape charge. Dissatisfied by the convictions and sentences, they all appealed separately to the High Court at Mwanza. The High Court (Mchome, J.) found their appeals devoid of any merit and dismissed them. Aggrieved by the High Court judgement, they have appealed to this Court.

Although the appellants issued and lodged a joint notice of appeal, each one filed his own memorandum of appeal whose respective grounds of complaint are identical. In their respective memoranda of appeal and both written and oral submissions, they are challenging the decision of the High Court which upheld their convictions on the following grounds:-

- (1) The identification evidence going to implicate them with the robbery and rape was not corroborated and did not meet the guidelines spelt out in the case of **Waziri Amani v. R.** [1980] TLR 250;
- (2) The two courts below erred in not treating the evidence of the prosecution witnesses' as lies because it contained a lot of contradictions;
- (3) The weighing scale used to implicate them was not sufficiently identified to be the property of PW1 and was not tendered in evidence by the appropriate person, i.e. a police officer;
- (4) The evidence of PW1 and PW2 who are husband and wife ought to have been taken with great caution as they might have conspired to implicate the appellants;
- (5) PW3 was an accomplice and his evidence ought to have been taken with great circumspection;

- (6) The High Court overlooked the fact that PW2 was not found with sperms when examined by a doctor;
- (7) Since PW2 had no bruises and her PF3 Form did not show that there was penetration, then rape was not proved, and
- (8) The High Court judge did not objectively evaluate the entire evidence on record.

Mr. Feleshi, learned Senior State Attorney for the respondent Republic, responded to these grounds of appeal briefly and generally. He did not support the decisions of the two courts below.

In supporting the appeal Mr. Feleshi argued, very correctly in our view, that the anchor of the prosecution case was identification evidence and the application of the doctrine of recent possession. To him, the identification evidence of PW1 and PW2 ought not to have been relied upon as it was flawed with contradictions. He instanced the evidence of PW1 who claimed to have known the 1st appellant prior to the robbery but claimed his name was Nyakyarezo which

contradicted with that of PW2 who said his name was Nyambaka. Furthermore, he pointed out that PW2 testified that she also knew the 2nd appellant as Nyambake. Another contradiction he pointed out was in the evidence of PW3 and PW4. Whereas PW3 testified that the 3rd appellant was arrested on 31/12/1999, PW4 said that he was arrested at Mwanza. He finally submitted that "if the identifying conditions were favourable, then the confusions in the names would not have arisen". On the basis of these contradictions he urged us to hold that the identification evidence was very weak. He prayed the appeal to be allowed in its entirety.

Before we discuss the points raised in the memoranda of appeal we would like to give a brief account of the case which was presented to the trial District Court.

The first three prosecution witnesses, i.e. PW1 Mkirya Ibogo, PW2 Nyakuzira Mkirya and PW3 Mstapha Imesho reside at Ryamgabo Village in Musoma District. PW1 and PW2 are husband and wife and are neighbours of PW3. Both PW1 and PW3 own adjoining shops at the village.

On 27/12/1999 at about 9.45 p.m. PW3 had gone to his shop/hotel riding a bicycle. On arrival, as he was about to open the door, he heard a voice telling him that he was under arrest. Then two people appeared, one of whom was donning a T.P.D.F. uniform and another one had a gun. He was ordered to lie on the ground, which he did. His hands were tied with a rope. Then one of them took TShs. 160,000/= from him and the shop's keys were also taken. The shop was opened and buns taken therefrom. At the same time some other people arrived and they totalled seven in number.

After hitting PW3 with a panga and clubs, he was helped to stand up. They took him to the rear side of the shop, opened it, took whatever they wanted and packed them in polythene bags and cloths. They loaded them on the bicycles they had. Thereafter they ordered him to call out to PW1. He obeyed and called PW1 thrice. By that time, PW3 had already recognized some of the bandits. Those he recognized by the help of light from the full moon were the five appellants, who were well known to him prior to that day.

On being called out by PW3, PW1 who was with PW2 in their house-cum-shop got out of bed and lit a lamp. As he was putting on

some clothes he was commanded from outside to hurry up as they were soldiers from Kiabakari searching for contraband goods. As soon as he opened the door he was "put under arrest" and hit hard on the shoulder with an iron bar. He was pulled violently out of the house, and was shown a gun. Then the 3rd and 4th appellants entered the shop and begun to demand money from PW2, who told them that the money was with PW1. She was thrown out of the house and chained. The 2nd appellant placed a panga on PW1's neck demanding money. PW1 directed them where the money was. They took TShs. 140,000/=. Then PW2 was unchained, taken only five paces away and was ravished in turns by all the gangsters in the presence of PW1 and PW3. After satisfying each one's beastly desires, they re-tied her. Then the 1st, 4th and 5th appellants entered the shop, leaving the 2nd and 3rd appellants outside. They stole a lot of merchandise including a weighing machine, all valued at TShs. 685,080/=. They then settled down under the full moonlight to celebrate their "victory" by drinking sodas and buns stolen from the two shops. While they were so entertaining themselves, PW3 managed to loosen the ropes tying him and on freeing himself he escaped.

After PW3 had covered a safe distance, he raised an alarm. The bandits then took to their heels with their loot. People responded to the alarm and freed PW1 and PW2 who mentioned the five appellants to have been among the robbers. The bandits were pursued and arrested immediately thereafter with the exception of the 3rd appellant who escaped but after being cut with a panga by PW4. He was subsequently arrested in Mwanza. Of all the goods stolen, only the weighing machine was allegedly recovered.

All of the appellants denied to have committed any of the two offences. They unequivocally denied to have been anywhere close to the shops of PW1 and PW3 on the material night. They claimed they were arrested because of local political rivalries. The 3rd appellant told the trial court that he was in fact arrested on 24/1/2000 at Isamilo, Mwanza by policemen who were looking for his relatives from Musoma. Because they missed them they arrested him and his wife, detained them at Mwanza Central Police Station until 2nd February 2000 when they were transferred to Musoma and charged on 4/02/2000.

The trial District Court accepted the evidence of PW1, PW2 and PW3 to be true and convicted all the appellants as charged. It did so after finding PW1, PW2 and PW3 to be credible and reliable witnesses. Their evidence not only proved the offences of robbery and rape but gravely incriminated the appellants.

On the issue of identity of the culprits, the learned trial Resident Magistrate reasoned thus:-

"I will now answer the last issue i.e. whether accuseds are real culprits. PW1 Mkirya, PW2 Nyakunzirya and PW3 Mustapha deposed that they knew accused persons before the material time. All of them deposed that they knew the first accused by name ... PW1 Mkirya deposed that the accuseds were his customers. PW3 Mustapha did testify that he saw and marked the accuseds faces. He added that he identified the first accused by the name of Nyakihezera as he was known at their home village. He identified the second accused by the name of Nyambuke as it was known at their home.

Given the nature of evidence we do not have reasons to fault PW1 and PW3's identification evidence. They deposed that they identified the thugs as it was a night with full moonlight. There was ample time to identify them and the thugs were very close at least at the time of demanding money and also at the time of tying them.

The identification evidence given by PW2 Nyakunzirya was in my firm view very tight. She knew the accuseds before as they were their customers. She had also ample opportunity to identify them very closely at the time they raped her in turn assisted by the moonlight.

Not only that but also after an alarm was raised by PW3 Mustapha the first, second, third and fourth accuseds were apprehended immediately at their place. It was almost a hot pursuit. The third accused was found dressed in T.P.D.F. uniform which he wore in commission of the offence. The first accused was also surrounded as per PW3 Mustapha and PW4 Jastine Kitoki and found with a weighing scale that was stolen and a

gun. He managed to escape although he was injured by Jastine Kitoki."

From the above extract it is clear that the trial magistrate adequately addressed himself on the need for caution before convicting the appellants in reliance on the correctness of the evidence of identification of the appellants which was hotly contested. He was absolutely satisfied that there was no mistaken identity as the appellants were known to the witnesses. We would like to observe, however, that reference to "the first accused" in the last sentence of the extract was only a slip of the pen. The learned magistrate had in mind the 5th accused (now 3rd appellant) who was mentioned specifically by both PW3 and PW4 and was indeed arrested in Mwanza.

The learned first appellate judge unreservedly concurred with this crucial finding of fact by the trial court. He, too, was of the firm view that the appellants were clearly identified by the three prosecution witnesses as there was light from the full moon and a lamp and they took a long time to commit what he called the "heinous crime".

This is a second appeal. The law is now well settled that in a second appeal the court is always cautious in reversing concurrent findings of fact made by the courts below unless they are, on the face of it, unreasonable or perverse. Such a situation can occur when it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or a violation of some principle of law or practice. In short, this is a jurisdiction which we exercise very sparingly: see for example, **Dr. Pandya v. R** (1957) E.A. 336, **Amraltlal D.M. t/a Zanzibar Silk Stores v. A.H. Jariwala t/a Zanzibar Hotel** [1980] TLR 31, **D.P.P. v. Norbert Mbunda**, Criminal Appeal No. 108 of 2004 (unreported), **Zakaria John & Another v. R**, Criminal Appeal No. 9 of 1998 (unreported) dated 15/07/2005, among many others.

As we clearly stated at the beginning, the crucial issue in the appeal is that of visual identification. Have both parties to this appeal raised any good ground upon which we can fault these concurrent findings of facts? Our considered answer is in the negative.

The evidence of PW1, PW2, PW3 and PW4 is what is known in law as positive evidence. This is evidence where a witness testifies that a particular event did or did not occur. In the leading case of **Commonwealth v. Webster** (1850) 50 Mass. 255, Shaw, C.J. instructively said:-

"The advantages of positive evidence is that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done, and the only question is whether he is entitled to belief. The disadvantage is that the witness may be false and corrupt, and that the case may not afford the means of detecting his falsehood".

This disadvantage has not been suggested either by the appellants or by Mr. Feleshi who supported the appeal. The assault on the veracity of PW1 and PW2 was based on the fact of their being husband and wife. To us this cannot be a good reason for doubting, leave alone discrediting, their positive evidence. As this Court succinctly stated in the case of **Ezekiel Noel v. R**, Criminal Appeal No. 25 of 2002 (unreported), there is no law prohibiting persons in filial or conjugal relationship, from corroborating one another. In this

particular case, fortunately, the evidence of both witnesses need no corroboration at all. So this ground of complaint fails.

Another ground of complaint is that there was no proof of penetration in respect of the rape offence for the reasons already stated. This too is arid of merit. Penetration is not proved by presence of semen on the body of the prosecutrix or bruises on her vaginal region. If bruises were such a natural consequence then many women would have opted for total abstinence. The best proof was provided by PW2 herself who categorically stated that all the appellants carnally knew her in turns. There is unchallenged evidence on record showing that when the 4th appellant was carnally knowing PW2, the 5th appellant asked: "*anakata kiuno?*" and the 4th appellant replied, "*ananichezea*". We find support for our proposition that the best evidence on penetration in the case of an adult comes from the prosecutrix, in the decision of this Court in **Selemani Makomba v. R**, Criminal Appeal No. 94 of 1999 (unreported). We have also found no iota of evidence to indicate that PW3 was an accomplice and if so an accomplice of whom if not the appellants themselves? Lastly, the alleged confusions in the names of some of

the appellants were non consequential. After all what is in a name? The witnesses knew them and mentioned their popular names and were arrested immediately.

In the case of **Waziri Amani v. R.** (1980) TLR 250, this Court said:

"Although no hard and fast rules as to the manner a trial judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him; the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters to which the trial

judge should direct his mind before coming to any definite conclusion on the issue of identity" (emphasis supplied).

Of course it will be instructive to add that as this Court observed in **Alex Kapinga and Three Others v. R.**, Criminal Appeal No. 252 of 2005 (unreported), the guidelines set out in **Waziri Amani's** case were not meant to be exhaustive.

In fine, we say that the entire case depended on the credibility and quality of visual identification evidence of the four prosecution witnesses. The courts below believed them. We agree that the conditions for a correct identification as clearly set out in the case of **Waziri Amani** were met. It is, therefore, not given to us now to substitute our own view of the matter unless it can be demonstrated that the concurrent findings of those courts were incompatible with the evidence. The appellants and Mr. Feleshi have failed to do so. On our own evaluation we have failed to find out if that was the case. Once PW1, PW2, PW3 and PW4 were believed and the issue of mistaken identity ruled out, we confidently discount any thought of the appellants being wrongly convicted. Their convictions were richly deserved.

All said and done we dismiss this appeal in its entirety.

DATED at MWANZA this 16th day of March, 2007.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

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



(S. M. RUMANYIKA)
DEPUTY REGISTRAR