

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: KWARIKO, J.A., KEREFU, J.A. And MAIGE, J.A.)
CRIMINAL APPEAL NO. 40 OF 2021
GODFREY LUSIAN SHIRIMA.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT
(Appeal from the decision of the Court of the Resident
Magistrate of Dar es Salaam at Kisutu)
(Hamza, PRM Ext. Jur.)
dated the 17th day of December, 2020
in
Extended Jurisdiction Criminal Appeal No. 53 of 2020
.....

JUDGMENT OF THE COURT

20th & 29th September, 2022

KWARIKO, J.A.:

Before the District Court of Kinondoni at Kinondoni, Godfrey Lusian Shirima, the appellant, stood charged with unnatural offence contrary to section 154(1)(a) and (2) of the Penal Code [CAP 16 R.E. 2002; now R.E. 2022] (the Penal Code). It was alleged by the prosecution that on 19th day of March, 2019 at Mbezi Stand Area within Kinondoni District in the Region of Dar es Salaam, the appellant had carnal knowledge against the order of nature of 'DS' (name withheld to hide his identity), a boy aged eleven years.

Having denied the charge and after a full trial, the appellant was convicted and sentenced to imprisonment of thirty years. Upon being aggrieved by that decision, the appellant appealed to the High Court of Tanzania at Dar es Salaam District Registry. However, by an order dated 10th November, 2020, the High Court transferred that appeal to the Court of the Resident Magistrate of Dar es Salaam at Kisutu in terms of section 45(2) of the Magistrates' Courts Act [CAP 11 R.E. 2019] to be heard by Hamza, Principal Resident Magistrate with Extended Jurisdiction who in turn dismissed the appeal.

Undaunted, the appellant has approached the Court on a second appeal upon the following five grounds of complaint:

- 1. That, the appellant was wrongly deprived of an opportunity to be heard, since the first appellate court did not consider the grounds of appeal and written submission which [were] raised and made by the appellant.*
- 2. That, the learned Principal Resident Magistrate with Extended Jurisdiction grossly erred in law to sustain the appellant's conviction and sentence basing on invalid evidence of a child of tender age (PW2) who testified under oath without being asked by the trial court as to whether she understands the nature of an oath.*

- 3. That, the learned Principal Resident Magistrate with Extended Jurisdiction erred in law to uphold the appellant's conviction and sentence basing on the evidence of visual identification of PW2 which was not properly done and which was not absolutely watertight for positive identification.*
- 4. That, the learned Principal Resident magistrate with Extended Jurisdiction erred in law and fact to find corroborative evidence from the testimonies of PW4 Mohamed Twaha Asenga and PW3 Dr. Peter Gattani which is lacking and valueless for it to require corroborative evidence.*
- 5. That, the learned Principal Resident magistrate with Extended Jurisdiction erred in law and fact to sustain the appellant's conviction and sentence while the prosecution side failed to prove their case to the required standard i.e beyond reasonable doubt.*

The factual background which led to the appellant's conviction is as follows. According to 'MGK' (PW1), the mother of the victim, following demolition of her residential house by the Government at Ubungo Kibo area, the appellant offered her shelter at one of the rooms in one garage where he was a watchman. PW1 stayed in that room together with the victim. On 9th March, 2018, PW1 left the victim under the care of the appellant while going to do business at a place known as Maramba. Whilst there, one security

guard came to inform her that her son had been sexually assaulted by the appellant. She returned to the place where she had left the victim and the appellant but she was informed that they had been taken to the police station. At the police station, PW1 was told that the victim had been taken to the hospital and on arrival there, she found the victim who told her that he had been sexually assaulted by the appellant.

At the hospital, the victim was attended by Dr. Peter Gattani (PW3). PW3 testified that upon examination of the victim, he found bruises in his anus and the victim felt pains when he touched his anus. He posted his findings in the PF3 which was admitted in evidence as exhibit P1. As to what happened at the scene of crime, the victim who testified as PW2 narrated that on the material night while asleep, a person wearing a huge coat and hat with a machete, whom he identified as the appellant, woke him up and directed him to go to sleep inside the car. He complied and while there, the appellant threatened him with the machete, gave him cooking oil and ordered him to apply into his anus. Thereafter, the appellant sodomised him. When he finished, the appellant asked him to get out of the car and while outside, he met a Maasai watchman who had a torch. He informed him on what had

happened and suddenly the appellant who was wearing jeans and vest came. The Maasai started assaulting him before other people joined in the assault. One of those people was Mohamed Twaha Asenga (PW4) who was a mechanics in the said garage. Shortly thereafter, the police came and took the appellant together with PW2 to police station and hospital. It was PW2's further testimony that he identified the appellant through his voice and face before he sodomised him.

No. 1712 DC Miraj (PW5) who investigated this case testified that in the course of his investigation, he interrogated the appellant who confessed to the allegations and thus he recorded his cautioned statement. During the trial, despite the appellant's objection on account of torture, the statement, after an inquiry, was admitted in evidence as exhibit P2.

The appellant was the only witness in his defence. He denied the allegations and testified that on the material date a customer came at the garage with a car for repair. Upon completion of the said repair, the customer left and the appellant headed home. While at the bus stop, the same customer who was in the company of policemen approached him and was arrested for allegations that he had stolen TZS 1,000,000.00 from the car he had repaired earlier.

He was sent to the police station where he was beaten and forced to sign some papers whose contents he did not know. The police continued to beat him until he became unconscious only to find himself at the hospital on 13th March, 2018. At the hospital, he was again given papers to sign which he was told were for his treatment and was discharged on that day.

At the hearing of the appeal, the appellant appeared in person without legal representation, whilst the respondent Republic had the services of Mr. Adolf Verandumi, learned State Attorney who supported the appeal on the basis of the third ground of appeal concerning the identification of the appellant at the scene of crime.

It was the appellant's argument in respect of the third ground that the victim did not identify his assailant given the fact that the incident occurred at night and the source of light was not mentioned. He argued further that, although the victim testified that there was some light at the scene, he did not state its source and in any case had there been any light, the alleged Maasai watchman could not have used a torch around the garage. He also contended that the identification could not have been possible as the victim told the trial court that the assailant had a huge coat and hat covering his face. He argued that, since the police did not

conduct voice identification parade it was not enough for the victim to allege that he identified his assailant by his voice.

On his part, the learned State Attorney conceded that the victim did not mention the source of light used to identify his assailant and the identification by voice was not conclusive evidence for positive identification. He thus contended that there was no sufficient evidence to prove that the appellant was identified at the scene of crime as the one who committed the offence against the victim. He thus submitted that, the conviction against the appellant was unfounded. Commenting on the sentence that was meted out by the trial court, the learned State Attorney argued that upon a proper conviction, the punishment would have been life imprisonment as provided under section 154 (2) of the Penal Code.

We have considered the submissions by both parties and the issue for our determination is whether the appellant was positively identified at the scene of crime. In many instances, this Court has stated the legal principles governing the evidence of visual identification. These include; **one**, such evidence is of the weakest kind and most unreliable and should be acted upon cautiously after the court is satisfied that the evidence is watertight, and all possibilities of mistaken identity are eliminated. **Two**, even if it is

evidence of recognition that evidence must be watertight. In that regard, where the offence is committed at night, and the question of light is in issue, there must be clear evidence as to the intensity of the said light and that bare assertions, would not do. **Three**, in matters of identification, conditions for identification alone, however ideal they may appear are no guarantee for truthful evidence. (See **Mohamed Shabani v. R**, Criminal Appeal No. 41 of 2009; **Magwisha Mzee & Another v. R**, Criminal Appeal Nos. 465 and 467 of 2007; **Shadrack Kuhaha v. R**, Criminal Appeal No. 139 of 2015; **John Jacob v. R**, Criminal Appeal No. 92 of 2009; and **Daniel s/o Paul @ Meja v. R**, Criminal Appeal No. 307 of 2016 (all unreported).

In the case at hand, it is not disputed that the incident occurred at night hours. The complainant, PW2 testified that although his assailant had put on a huge coat and a hat which covered his face, he managed to identify him because there was some light within the garage compound and that he recognized his voice as he was familiar to him having been stayed in the same compound for some time.

Starting with the light at the scene of crime, the victim did not tell the trial court the source of that light; whether it came from

electricity, solar energy or lamp. He did not also state the position of the light, the area of coverage and the distance from where it illuminated to where he had been with his assailant. As correctly argued by the appellant, had there been any light at the scene of crime, the alleged Maasai watchman who assisted the victim, would not have used a torch to assist him to see. In the circumstances, we agree with both parties that there was no any source of light established at the scene upon which PW2 could have identified his assailant. Even though, PW2 said he identified his assailant to be the appellant because he was familiar to him, in the absence of any source of light, it was not possible to avoid any possibility of mistaken identity. After all, PW2 testified that during the sexual assault, he was ordered to face the opposite direction thus making it even difficult to mark the face of the assailant. Worse still, even the Maasai watchman alleged to have been the first person the victim reported the incident and that he assisted the victim, did not testify.

As regards the evidence of voice identification, what we can say is that, it is very unreliable due to the ease with which it can be imitated. In the Court's previous case of **Stuart Erasto Yakobo v.**

R, Criminal Appeal No. 202 of 2004 (unreported), when faced with similar scenario, it was stated thus:

"In our considered opinion, voice identification is one of the weakest kinds of evidence and great care and caution must be taken before acting on it. We say so because there is possibility that a person may imitate another person's voice."

With the foregoing discussion, it can safely be concluded that the appellant was not sufficiently identified as the perpetrator of the alleged offence against the victim. The third ground of appeal has merit. Having resolved the third ground in the affirmative, we find no need to determine the remaining grounds of appeal.

However, before we conclude, we would like to comment on the sentence which was meted out against the appellant by the trial court and upheld by the first appellate court. As rightly argued by the learned State Attorney, where a person is convicted of the unnatural offence under section 154 (1) (a) and (2) of the Penal Code and the victim is a child aged below eighteen years, the sentence is life imprisonment. On the contrary, in this case where the victim was aged eleven years, but the appellant was sentenced to thirty years in prison.

Notwithstanding the above explanation, we agree with both parties that the prosecution case was not proved beyond reasonable doubt against the appellant. We thus find the appeal meritorious and we hereby allow it, quash the conviction and set aside the sentence meted against him. It is further ordered that the appellant be released from custody unless his continued incarceration is related to other lawful cause.

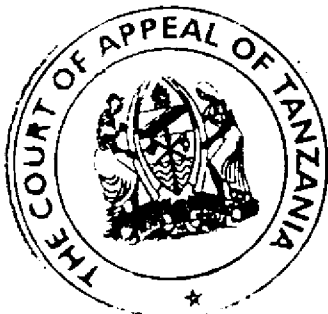
DATED at DAR ES SALAAM this 28th day of September, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The judgment delivered this 29th day of September, 2022 in the presence of the appellant in person linked-Via Video from Ukonga Prison and Ms. Imelda Mushi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL