IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: RAMADHANI, C.J., MUNUO, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 215 OF 2005

ISSA NGWALI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(LUKELELWA, 1)

Dated the 28th day of October, 2005

in

Criminal Appeal No. 62 of 2005

JUDGMENT OF THE COURT

November 23 & 27, 2009

MJASIRI, J.A.:

The appellant, ISSA NGWALI, was sentenced to a jail term of life imprisonment by the District Court of Lindi, consequent upon his conviction for the offence of Gang Rape contrary to section 130 and 131 of the Penal Code Cap 16, R.E. 2002 as amended by the Sexual Offences Special Provisions Act (Act No. 4 of 1998). Aggrieved by the decision of the District Court, the appellant appealed to the High Court at Mtwara. He lost his appeal in the High Court, hence his appeal to this Court.

At the hearing of the appeal, the appellant was unrepresented and the Respondent was represented by Ms Evetta Mushi, learned State Attorney.

The background to this case is as follows. There was a ritual dance (initiation ceremony) at Rutamba village which was attended by the complainant PW2, PW1, PW2's hostess and the appellant. The appellant made sexual advances to PW2 but was unsuccessful. The appellant then joined his friends and sent one of them to collect PW2. PW2 refused to accompany him. He pulled PW2's hand and dragged her into the bush where she found a group of five (5) men. They pushed her down, removed her underwear, and took turns to rape her. She was also sodomised. She screamed for help and her mouth was gagged. One of the men stabbed her with a knife on her back side. PW2 then returned home. She however did not reveal her ordeal to her hostess until the third day. She then narrated to PW1 what had actually transpired. She also named her assailants, the appellant being one of them. The appellant denied any involvement with the offence.

The Appellant filed six (6) grounds of appeal. The summation of his grounds is that there was no sufficient evidence to ground his conviction. The salient issue to be determined in this case is whether PW2 was raped and whether it was the appellant who raped her.

Ms Mushi did not support the conviction of the appellant for the following reasons. The only evidence implicating the appellant is the evidence of identification. According to the charge sheet, the incident occurred at night at around 10.00 p.m. PW2 did not indicate in her testimony the type of light that was used to identify the appellant. She made a revelation about the rape on the third day, when she named the culprits. Ms Mushi concluded that the complainant's identification of her assailants was not water tight in the absence of giving an indication on the source of light relied upon.

The pivotal question is, is the evidence on record sufficient to uphold a conviction? While the evidence of PW1 and PW2 clearly establishes that PW2 was raped, the only evidence linking the appellant with the offence is that of PW2. The circumstances of the identification of the appellant were not favourable. PW2 did not state in her testimony the source of light used in identifying the appellant. As rightly pointed out by the learned State Attorney the incident occurred at night. In Abdullah Bin Wendo v R (1953) 20 EACA 166 it was stated that there is always the need for testing with greatest care the evidence of a single witness in respect of identification. See Roria v Republic (1967) EACA; R v Turnbull 1977 QB 224; Mburu and another v R (2008) 1 KLR 1229 and Vhengani v The

State [2007] SCA 76 (RSA). The Court has stated in numerous decisions, the most celebrated one being Waziri Amani v The Republic [1980] TLR 250 that the evidence of visual identification is easily susceptible to error. At page 251-252 of the judgment the Court succinctly stated as under:

> *"The evidence of visual identification is of the weakest kind and most unreliable. It follows therefore, that no Court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the Court is fully satisfied that the evidence before it is absolutely water tight."*

The key identifying witness, PW2, did not advert to the guidelines enunciated by this Court in Waziri Amani. She did not give any description of the appellant and the first accused person nor did she state what they were wearing. The type of light used by her in identifying the appellants was also not indicated.

It is settled law that the prosecution is required to prove the case against the Appellants beyond reasonable doubt. It is clear from the evidence available that the prosecution failed to meet the standards required under the law. This is a case where a determination wholly depends on the evidence on the identity of the appellant.

In the case of Raymond Francis v R [1994] TLR 100 at 103 it was stated as follows:-

"...It is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring identification is of the utmost importance."

Taking into account the settled position of the law, we can say with certainty that the evidence of identification as given by PW1 cannot be said to have met the legal requirements by any standard. We are therefore of the considered view that the identification evidence is of the weakest character and did not justify the conclusion reached by the Courts below.

For the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence of life imprisonment. The appellant is to be released forthwith unless otherwise lawfully held.

DATED at MTWARA this 27th day of November, 2009.

A.S.L. RAMADHANI
CHIEF JUSTICE

E.N. MUNUO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

(KITUSI)
SENIOR DEPUTY REGISTRAR