

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

(CORAM: MSOFFE, J.A., KILEO, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO 274 OF 2007

ANAEL SAMBO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Jundu, J.)

**dated the 24th day of July, 2006
in
Criminal Appeal No. 32 of 2005**

JUDGMENT OF THE COURT

2nd & 3rd September, 2010

MSOFFE, J.A.:

This is a second appeal. It arises from the decision of the High Court of Tanzania at Moshi (Jundu, J. as he then was) upholding the District Court of Moshi (Kabwe, RM.) in which the appellant was convicted of rape contrary to section 130(1) of the Penal Code, as amended, and sentenced to thirty years imprisonment.

The appellant filed a ten point memorandum of appeal. In substance, the major complaint is that the evidence, especially that of visual identification, was not enough to warrant the conviction in question.

T.J. Mushi

Briefly, PW2 Vumilia Lyatuu, the complainant and the victim of the alleged rape, told the trial District Court that on 12/9/003 at about 20.00 hours she was going to a nearby shop to buy some medicine. Before reaching the shop she met the appellant and another person called Cliff Temba who had a torch. The two "torched" at her eyes and then took her into a banana farm where they raped her in turns. On that day she wore a flower coloured dress which sustained blood as a result of the rape. After the rape, she went back home with the blood stained dress and told her husband about what befell her. She and her husband went to Kiborloni Police Post to report the incident. She was given a PF3 and went to Mawenzi Government Hospital where she was attended by PW5 Dr. Mafikiri. According to the doctor he: -

... discovered that in the vulva vaginal canal there was a pelvic and there was no bruises. The said pelvic had been protruded out. This was so dangerous since it can cause in a long run meningitis even death later. There was no sperms...

As correctly submitted before us by Mr. Rwegerera, learned State Attorney for the respondent Republic, the determination of the case hinges on the crucial aspect of identification. In this sense, the question is whether or not the evidence of PW2, the sole identifying witness, was watertight. According to Mr. Rwegerera PW2 duly identified the appellant on the fateful night because she knew him before that date and that the incident took a long period of time. With respect, while we agree with Mr. Rwegerera that the above points are important in a case based on visual identification, we do not go along with him that they were enough to establish the identity of the appellant beyond doubt. We say so for reasons which we will demonstrate hereunder.

The judge on first appeal addressed the issue of identification as follows: -

*...taking the principles of visual identification stated by the Court of Appeal in the case of **Waziri Amani** (supra), the Appellant was properly identified by PW2 at the scene of the crime. The rechargeable head lamp which the Appellant had at the material time had provided sufficient light for PW2 to identify the Appellant at*

the scene of the crime. Secondly, PW2 had known the Appellant before the incident as they were neighbours and had lived together for many years according to the evidence on record. Thirdly, the distance between PW2 and the Appellant on the material night was close as their bodies had been in touch during the raping incident hence it was not difficult for PW2 to identify the Appellant. Fourthly, PW2 had sufficient time to observe the Appellant from the time he had stopped her and dragged her to the banana shamba and during the time he was raping her taken into account that the Appellant and his fellow rapist had raped PW2 in turns.

With respect, the evidence on record does not show that PW2 identified the appellant with the aid of a rechargeable head lamp. On the contrary, her evidence was that she identified the appellant because the appellant and Clif Temba flashed the torch at her. In our view however, we think that it was not easy for PW2 to identify the appellant with the torchlight for two reasons. **One**, under normal circumstances it is not easy for a person towards whom a torch is flashed to identify the person

flashing the torch at him/her. **Two**, it was not disclosed in the evidence whether the torchlight was bright enough to allow for correct identification.

This brings us to the point canvassed by Mr. Rwegerera that PW2 knew the appellant prior to the date of incident; and therefore that it was easy to identify him on the fateful day. With respect, the fact that PW2 knew the appellant before that date was not enough. PW2 ought to have gone further and state exactly how he identified the appellant at the time of incident, say by his distinctive clothing, height, voice etc. Apparently no such evidence was forthcoming from PW2.

On the assertion by Mr. Rwegerera that the incident took a long time and hence allowing for correct identification, again we think this not a strong factor in the case. We say so because in the evidence of PW2 the incident took place at around 8.00 p.m. She did not go a step further and disclose the duration of the incident. We appreciate that her husband PW4 Fidelis Lyatuu said that PW2 went back home at around 2.00 a.m. That might as well have been true. But that would not necessarily suggest that the incident took place from 8.30 p.m. to 2.00 a.m. because, in the

absence of evidence to the contrary, it was still possible that PW2 passed through some other place(s) before going back home.

There is one other complaint raised by the appellant in the memorandum of appeal which we wish to address here, *albeit* briefly. That the observation by the doctor that the "pelvic protruded out" might have been caused by something else other than the alleged rape. In the appellant's view, it was quite possible that the "pelvic protruded out" when PW2 was giving birth to her two and a half months old baby. Apparently in his evidence the doctor did not say whether the "pelvic protruded out" because of the alleged rape. In the absence of such evidence the suggestion made out by the appellant might as well have been correct.

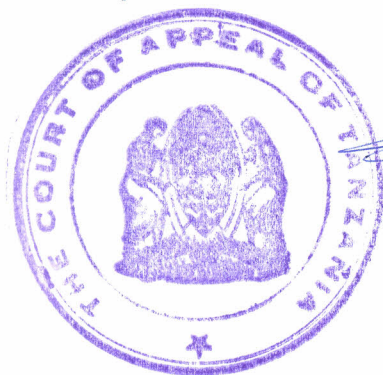
All in all, in the justice of this case, we think that the evidence of visual identification by PW2 was not enough to ground the conviction in question. For this reason, there is merit in the appeal. We hereby allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released from prison unless lawfully held.

J.H. MSOFFE
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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




E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL