

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

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 276 OF 2019

**PHINIAS ALEXANDER
SIMION SELESTINE
ELIUD ONESMO** }**APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mlacha, J.)

dated the 3rd day of May, 2019

in

Criminal Appeal No. 19 of 2017

JUDGMENT OF THE COURT

8th & 16th December, 2020

MUGASHA, J.A.:

In the District Court of Karagwe at Karagwe, the appellants were charged with gang rape contrary to section 131 (1) and (2) of the Penal Code Cap 16 RE. 2002. It was alleged in the charge that, on 27/8/2016 at Rugele village within Karagwe District in Kagera Region, the appellants did unlawfully have sexual intercourse with a 62 years old lady whom we shall refer as J.M in order to conceal her identity.

The background to the present appeal is briefly as follows: on the fateful day, the appellants and the victim happened to be at a bar drinking liquor. At around 10.00 pm the owner wanted to close the bar and he told customers including the appellants and the victim to leave and they did so whereas each took a different route. While on the way going home, the victim claimed to have met the first appellant who seduced her to have sexual intercourse with him but she declined. Then, the victim claimed to have been beaten by the first appellant and the rest of the appellants surfaced dragging the victim to a banana plantation, raped her in turns holding her mouth so that she could not raise an alarm. She was badly injured as blood was oozing out from the private parts and fell unconscious until on the following morning when she crawled to a neighbour's house and gathered strength upon being given a solution of water mixed with sugar. The victim was taken to a nearby dispensary where she was initially attended by a Clinical officer, Vestina Mkagirage (PW6) who after establishing that the victim was bleeding profusely and her vagina and uterus were ruptured, she referred her to Nyakahanga Hospital. Thereat, upon being admitted, the victim was further attended by Doctor

DeusDedity Rwamarumba (PW7) who established that, the victim had severe pains because of sceptic wounds around her private parts.

The victim claimed to have identified the appellants as they were familiar and that she had a drinking spree with them on the fateful day at the bar owned by Theonest Festo (PW3) who told the trial court that the victim mentioned the appellants to be those who gang raped her. A similar account was given by the victim's daughter Aishati Hassan (PW2). According to the investigator WP 3635 d/c Zuhura (PW4), the victim told her that she managed to identify the appellants aided by electricity from the neighbouring houses. Later, the appellants were arrested and arraigned in court.

In their defence, apart from denying the accusations by the prosecution, they admitted to have been together with the victim at the bar on the fateful day. While there, it was the second's appellant account that the drunk victim was dancing and later picked a fight with one Sofia over liquor but he managed to stop it. Besides, they all recalled to have returned at their homesteads and so did the victim but every one took a different route and that it is on the following day when they heard what

had befallen the victim. The first appellant recounted to have visited the ailing victim at her residence.

The trial court was satisfied that, the charge was proved to the hilt because: **One**, the appellants were not strangers to the identifying witness aided by electricity light, managed to identify them. **Two**, the victim's account on the rape was corroborated by PW6 and PW7, the medical personnel who attended the victim. Thus, the appellants were convicted and sentenced to life imprisonment. They unsuccessfully appealed to the High Court where their appeal was dismissed hence the present appeal. In the joint memorandum of appeal, they have raised ten grounds which can be conveniently condensed into mainly two grounds namely:

1. That, the conviction is wrong because they were not properly identified at the scene of crime.
2. That, the charge was not proved beyond reasonable doubt.

At the hearing, the appellants entered appearance in person, unrepresented whereas the respondent Republic had the services of Mr. Grey Uhagile, learned State Attorney.

The appellants urged the Court to consider the grounds of appeal and proceed to set them at liberty. On the other hand, the learned State Attorney from the beginning supported the appeal. He submitted that, the appellants were not properly identified because: **One**, the victim did not mention them at the earliest opportune time to the neighbours who first attended her soon after she was raped and as such, mentioning them later to other witnesses was an afterthought. To back up this proposition, he cited to us the case of **GODFREY GABINUS @NDIMBA AND TWO OTHERS VS REPUBLIC**, Criminal Appeal No. 273 of 2017 (unreported). **Secondly**, as the victim did not describe the source of light which enabled her to identify the appellants, PW4's account that he was told by the victim on the presence of electricity light at the scene by the victim contradicts the victim's account and it casts doubt on the prosecution case. Moreover, the conditions were not conducive for a positive visual identification considering that, the source of light was from a neighbouring house which was 70 meters away. In this regard, the learned State Attorney concluded that since the appellants were not properly identified, the appeal is merited and he urged the Court to allow it.

Having carefully considered the grounds of appeal, the submissions and the record before us, the issue for consideration is whether the charge was proved to the hilt.

Considering that the fateful incident was at night in the dark we shall be guided by the principles guiding visual identification. The Court has always emphasized that, caution should be exercised before relying solely on the visual identification evidence. In the case of **WAZIRI AMANI VS REPUBLIC** [1980] T.L.R 250, the Court laid down several factors to be taken into account by a court in order to satisfy itself on whether such evidence is water-tight. They include the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred; if it was day or night time; whether there was good or poor lighting at the scene; and whether the witness knew or had seen the accused before or not. This was followed in the case of **CHOKERA MWITA VS. REPUBLIC**, Criminal Appeal No. 17 of 2010 (unreported) whereby the Court reiterated that, the court should not act on such evidence unless all the possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely water tight.

Moreover, in **ISSA S/O MGARA @ SHUKA VS REPUBLIC**, Criminal Appeal No. 37 of 2005 (unreported), the Court among other things, said that it is not sufficient for witnesses to make bare assertions that “there was light” because the overriding need is to give in sufficient details on the intensity of the light and the size of the area illuminated by the identifying witness. This requirement was underscored by the Court in **SAID CHALLY SCANIA VS REPUBLIC**, Criminal Appeal No. 69 of 2005 and **KURUBONE BAGIRIGWA AND THREE OTHERS VS REPUBLIC**, Criminal Appeal No. 132 of 2015 (both unreported).

What we said in the case of **ISSA S/O MGARA** (supra) is applicable here because the incident occurred at night in the dark and the victim said nothing on the presence or source of light at the scene of crime. On this, the evidence of PW4 who, apart from contradicting the victim’s account, it is highly suspect because PW4 testified that it is the victim who told her about the presence of light at the scene of crime. As such, we agree with the learned State Attorney that the visual identification evidence did not eliminate possibilities of mistaken identification of the appellants. This is cemented by the victim’s failure to mention the appellants when she went

to the neighbours upon regaining strength and consciousness having testified what is reflected at page 6 of the record of appeal as follows:

"I [crawled] to my neighbour, I told her am dying, she took me at have place then she called another neighbour who gave me sugar and water, after drinking at least my body [regained] strength, they called my son who immediately came and took me to the hospital at Rugela."

In the case of **MARWA WANGITI AND ANOTHER VS REPUBLIC** [2002]

TLR 39 the Court said:

"The ability of a witness to name a suspect at earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry."

[See also **SWALEHE KALONGA AND ANOTHER VS REPUBLIC**, Criminal Appeal No. 45 of 2001, **MINANI EVARIST VS REPUBLIC**, Criminal Appeal No. 124 of 2007, (both unreported) and **JARIBU ABDALLA VS REPUBLIC** [2003] TLR 271.]

In the light of the reproduced victim's evidence at the trial, the earliest opportune time was her encounter with the neighbours. That apart, none of the neighbours who initially attended the victim was paraded as a prosecution witness. This leaves a lot to be desired because those neighbours were in a position to testify if the victim had mentioned the appellants after regaining consciousness and strength. Besides, it was not stated if the victim's neighbours were not within reach or could not be found and as such failure to summon them entitles this Court to draw an inference adverse against the prosecution. See – **AZIZ ABDALLA VS REPUBLIC** [1991] T.L.R 71. In the premises, the finding by the learned High Court Judge that, the victim mentioned the appellants soon after regaining strength is not supported by the evidence on record. Therefore, we agree with the learned State Attorney that, it was an afterthought on the part of the victim to mention the appellants to PW3 and PW4 who came later after the victim's encounter with the neighbours soon after she was gang raped.

At this juncture, with respect, we do not agree with the learned Judge of the High Court who was of the view that in the present matter the principles guiding visual identification in the case of **WAZIRI AMANI** (supra)

should be relaxed or not be followed. This is reflected at page 73 to 74 of the record of appeal. We found the observation wanting because in our criminal justice system, the burden of proving a charge against an accused person is on the prosecution. As such, it is incumbent on the trial court to direct its mind to the evidence adduced by the prosecution in order to establish if a case is made out against an accused person. This rule is applicable with equal force to an appellate court which sits to determine a criminal appeal and in that regard, we wish to associate ourselves with what was said by the High Court in the case of **JONAS NKIZE VS REPUBLIC** [1992] TLR 214 that:

"the general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking"

In view of the above, it is our strong considered view that the case of **WAZIRI AMANI** (supra) still stands to be good law on the guiding factors on visual identification.

In view of what we have endeavoured to discuss, we are satisfied that the charge was not proved to the required standard. Thus, the appeal is allowed conviction quashed, sentence is set aside and we order the immediate release of the appellants forthwith unless they are held for another lawful cause.

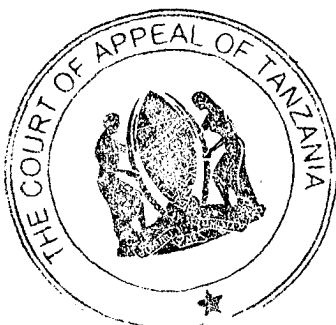
DATED at **BUKOBA** this 15th day of December, 2020.


S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S MWANDAMBO
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

This judgment delivered this 16th day of December, 2020 in the presence of the Appellants in person and Mr. Juma Mahone, State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL