**IN THE COURT OF APPEAL OF TANZANIA**

**AT DODOMA**

**(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)**

**CRIMINAL APPEAL NO. 593 OF 2015**

**OMARY MSAWILA MRISHO ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the Resident Magistrate Court of Singida at Singida)**

**(W.E. Lema, PRM (Ext. Jurisdiction)**

**dated the 7th day of December, 2015**
**in**
**PRM. Criminal Appeal No. 23 of 2015**

---

**JUDGMENT OF THE COURT**

19th & 21st April, 2016

**KILEO, J.A.:**

The appellant who was charged and convicted of armed robbery contrary to section 287A and rape contrary to sections 130 (1) and 131 (1) all of the Penal Code, Cap16 R. E. 2002 in the District Court of Singida, lost his appeal which was heard by a Principal Resident Magistrate to whom jurisdiction had been extended. Being aggrieved he lodged a second appeal which is now before us.

The case for the prosecution was predicated on the following facts: PW1 and PW3 who were husband and wife were residents of Karakana in Singida. On 30/12/2011 at around 00.30 hours they had their sleep terminated after a band of invaders forced their way into their house, assaulted them and made away with cash money amounting to Tshs. 90,000/-. The appellant is also said to have taken PW3 out of the matrimonial room, took her into one of the other rooms and raped her. Subsequently, PW4 (who initially was charged along with the appellant and convicted for possession of property suspected of having been stolen or unlawfully obtained), was seen wearing a khanga which PW3 purportedly identified as belonging to her.

The courts below were satisfied that the appellant's identification at the scene of the crime was watertight. They also found that the piece of khanga found in possession of PW4 further linked the appellant to the commission of the crime.

The appellant's memorandum of appeal consisted of 10 grounds of appeal. However, the appeal mainly centres on the question of identification and whether rape was established.

The appellant appeared before us in person with no legal counsel. On the other hand the respondent Republic was represented by Mr. Evod Kyando, learned State Attorney. When we called upon the appellant to address us on his grounds of appeal he opted that the learned State Attorney submits first.

Mr. Kyando did not find it wise to support the conviction and sentence imposed. He was of the view that visual identification, upon which the conviction was grounded, was not watertight so as to sustain the conviction. He also opined that the case for the prosecution with regard to the rape charge was further weakened by the fact that the doctor who examined the victim was not called in court as per requirement of the law.

As rightly pointed out by Mr. Kyando the case for the prosecution in this case centred mainly on visual identification. There is a litany of decisions of this Court emphasizing that before a court can found a conviction basing on visual identification evidence such evidence must be watertight so as to remove the possibility of not only mistaken identity but also the possibility that some witnesses may be untruthful. In **Raymond Francis v Republic** (1994) TLR 100 the Court stated as under:-

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

In **Said Chaly Scania v Republic,** Criminal Appeal No. 69 of 2005, CAT (unreported) it was stated thus:-

*"We think that where a witness is testifying about identifying another person in unfavourable circumstances like during the right, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistaken identification like proximity to the person being identified the source of light, its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger."*

Both **Raymond Francis** (supra) and **Said Chaly Scania** (supra) restated the principles laid down by this Court in **Waziri Amani Vs. Republic** (1980) TLR 250 where the Court after observing that the evidence of visual identification is of the weakest kind stated:

*"...in a case involving evidence of visual identification, no court should act on such evidence unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight....."*

In **Jaribu Abdalla v. R.**, Criminal Appeal No. 220 of 1994, the Court held:

*".....in matters of identification it is not enough merely to look at the factors favoring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence...."*

When this case is considered in the backdrop of the principles laid down in the above cases it becomes apparent to us that identification of the appellant at the scene of crime was not watertight.

The only identifying witness in this case was PW3. According to her at the time of the incident there was a Chinese lamp which was illuminating the room and enabled her to identify the appellant. The intensity of the light from the lamp was not however described. PW1 claimed that the lamp was a three batteries powered Chinese lamp but he did not specify the intensity of the light. From the evidence it was apparent

that two rooms were involved in whole incident- the matrimonial room and the other room where the rape took place. As pointed out by the learned State Attorney, the witnesses did not say where the lamp was placed. Was it in the matrimonial room or in the other room where the rape took place? If the lamp was in the matrimonial room was there enough light and time to recognize the appellant?

It is also worth noting that the victim did not disclose the name of the appellant to the first person who responded to the alarm raised though her husband claimed that she mentioned the appellant's name to him. At page 27 PW2 is recorded as having stated:

> *"She told me she identified the rapists but did not disclose their names."*

It is surprising that to her husband she named the appellant while failing to do so to their neighbor who went to their aid.

In view of the above scenario we concur with the views expressed by Mr. Kyando that identification of the appellant as the culprit was not watertight and it was not proper to sustain a conviction on such evidence of identification.

both the High Court and the trial court relied on the evidence of PW1

to hold that a khanga allegedly found in her possession was the same one stolen from PW3 and which was given to her by the appellant. What is clear though, from the charge sheet is that the khanga was not stated as one of the items that were stolen from PW3. PW3 claimed that while she was at the Regional Hospital she saw a lady wearing her khanga and that that lady told them that she obtained the khanga from the appellant for services rendered. Considering that the khanga had not been mentioned in the charge sheet we are of the view that it was unsafe to relate it to the charge against the appellant. Having found that the appellant's identification was not watertight, we see no need to embark on a consideration of the accusation of rape which would also be predicated on the question of identification.

We are mindful of the principle governing second appeals enunciated in a number of our decisions including that of **Felix s/o Kichele v. The Republic**, Criminal Appeal No. 159 of 2005 (CA-MZA) (unreported) where the Court held that a second appellate court can only interfere with a finding of fact if:-

*"it is evident that the courts below omitted to consider available evidence or have drawn wrong conclusion from the facts or if there have been mis-directions or non-directions on the evidence."*

In so far as this case is concerned, we are convinced that the nature and quality of the evidence relied upon by the first appellate court in upholding the appellant's conviction, merit our intervention.

In the light of our reflections above, we find that this appeal has merit. In the circumstances we allow it.

Conviction entered against the appellant is quashed and the sentence imposed is set aside. The appellant is to be released from custody forthwith unless he is therein held for some lawful cause.

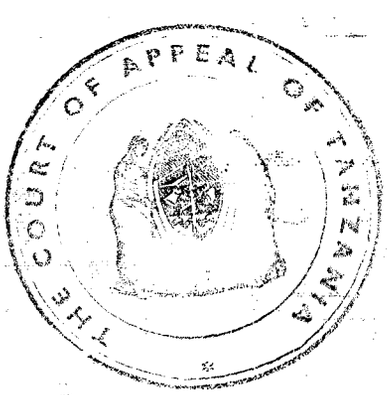
**Dated** at **Dodoma** this 20th Day of April 2016

E. A. KILEO
**JUSTICE OF APPEAL**

K. K. ORIYO
**JUSTICE OF APPEAL**

I. H. JUMA
**JUSTICE OF APPEAL**

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




E. F. FUSSI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**