

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MTWARA**

**(CORAM: JUMA, C.J., MZIRAY, J.A. And WAMBALI, J.A.)**

**CRIMINAL APPEAL NO. 386 OF 2017**

**YASIRI AYUBU JAFARI.....APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the High Court of Tanzania**

**at Mtwara)**

**(Twaib, J.)**

**Dated the 30<sup>th</sup> day of June, 2017**

**in**

**Criminal Appeal No. 128 of 2016**

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**JUDGMENT OF THE COURT**

18<sup>th</sup> & 26<sup>th</sup> February, 2019

**WAMBALI, J.A.:**

The appellant was prosecuted in the District Court of Kilwa at Kilwa with two counts. In the first count, he was alleged to have committed the offence of rape contrary to section 130(1) &(2)(b) and 131 of the Penal Code, Cap 16 R.E. 2002. The second count concerned the offence of assault causing bodily harm contrary to section 241 of the Penal Code, Cap 16 R.E.2002. In short, the background to the allegation was that on 22/2/2016 at about 10:00 hours at Kiwawa within Kilwa District in Lindi Region the appellant did have carnal knowledge to

one Esha Selemani Kawayi without her consent. It was further laid in the charge that at the same time he also assaulted the victim on her mouth by forcing clothes into her mouth; the act which occasioned her to lose two teeth and to suffer bodily harm.

The appellant denied the allegation. However, the trial District Court having heard the evidence of the prosecution and his defence, was convinced that the prosecution had proved the case against him beyond reasonable doubt and convicted him accordingly. As a result, he was sentenced to thirty years imprisonment for the first count and one year imprisonment for the second count. The sentence were to run concurrently. The trial court also ordered the appellant to pay the victim Tshs. 500,000/= as compensation.

His appeal to the High Court of Tanzania at Mtwara was unsuccessful hence this second appeal.

To demonstrate his dissatisfaction with both conviction and sentence, the appellant lodged before this Court a memorandum of appeal comprising nine grounds of appeal. However, for the reason which will be disclosed herein below, we do not intend to deal with all the grounds of appeal.

At the hearing of the appeal, the appellant appeared in person, unrepresented while Mr. Joseph Mauggo learned Senior State Attorney represented the respondent Republic. When the appellant was given the opportunity to address the Court on the grounds of appeal, he urged us to allow the learned Senior State Attorney to respond first.

Mr. Mauggo started by supporting the appeal of the appellant. His support was solely in respect of the complaint of the appellant in ground two. In short, the appellant complains that the victim, **Esha Selemani Kawayi** who testified as PW1 did not recognize him by name and therefore she did not fully identify him at the scene of the crime.

The learned Senior State Attorney conceded that in her testimony, PW1 did not specifically mention the name of a person who she alleged to have committed the offence of which the appellant was charged, convicted and sentenced. He explained that PW1 simply testified that she knew the appellant because he was born and raised in the same village where she lived and gave the story of how the incidence occurred. Mr. Mauggo emphasized that PW1 briefly told the trial court that she was invaded by the appellant who covered her face, took her to

the farm where he inserted a piece of cloth in her mouth before he proceeded to have sexual intercourse with her. He argued further that PW1 did not also describe the physical appearance of the appellant.

He added that unfortunately, Mohamed Yusuf Mpeli (PW2), who was the first to be informed by PW1 about the incidence of rape, testified that he was told that the person who was responsible was Yasiri Mtanda. However, later in his testimony, PW2 claimed that he knew well the appellant before the incidence as Yasiri Mbonde. In the circumstance, the learned Senior State Attorney submitted that it cannot be concluded that PW1 and PW2 knew well the name of the person who committed the offence of rape as the appellant name which appeared in a charge sheet is Yasiri Ayubu Jafari. He thus argued that as the case of this nature depends on, among others, the proper identification of the perpetrator, it cannot safely be concluded that the appellant was fully identified by PW1 at the scene of the crime.

Mr. Mauggo concluded his submission by urging us to allow the appeal and set the appellant at liberty as the prosecution did not prove the case beyond reasonable doubt. In his view, PW1 did not properly

identify and know the name of the person who committed the offence of rape.

Having heard the submission of Mr. Mauggo, the appellant did not have anything useful to add apart from agreeing with him in urging us to allow the appeal.

The major issue for our determination is whether the appellant was identified as the person who committed the offences of rape and assault causing bodily harm against PW1 on 22/2/2016.

Admittedly, in her testimony, PW1 did not specifically mention the name of the appellant despite the fact that she claimed to know him well as he was born and grew up in the same village she lived. She briefly testified that "On 22/02/2016 this accused came to me and invaded me, covered my face, carried me to farm".

Although the incidence was alleged to have taken place at 10:00 hours, which was favorable for proper identification especially to a well-known person, PW1 did not even describe the nature and a kind of a person she encountered on the fateful day. This casts doubt on whether she really identified her rapist. Unfortunately, as submitted by Mr. Mauggo, PW2 who was the first to be approached and got the first

version of PW1's story concerning the incidence and the alleged rapist, testified that he was told by PW1 that she was invaded by Yasiri Mtanda. To be specific PW2 testified to have been told by PW1 that:

*"mimi leo nilitaka kufa mwanangu, nimekamatwa na kijana Yasiri Mtanda".*

Yet, later in his testimony, PW2 who claimed to know well the appellant before the incidence, described him as Yasiri Mbonde and proceeded to identify him in court by pointing a finger. What is more interesting is that, during re-examination, PW2 stated that on the alleged date, the appellant wore grey trouser and the t-shirt he wore in court at the trial. Be that as it may, PW2's story cannot be taken to be true because according to the evidence in the record of appeal, PW1 did not mention the name or describe in detail the physical appearance and the attire of the appellant on the particular day.

We need to observe that the issue of the real name and identity of the perpetrator of rape is further complicated by the evidence of Said Abdallah Njenga, (PW3), the Village Executive Officer of Kiwawa who was the second to meet PW1. It is PW3 who wrote a letter referring PW1 to hospital. In his testimony, PW3 conceded that PW1 informed him that she was raped by a "man". PW3 also testified that PW1 told him that she

knew the person by face. However, later PW3 testified that PW1 described the appellant. PW3 testified further that he, together with his others traced the appellant and managed to arrest him on the second day. PW3 also testified that after the appellant was arrested he was identified by PW1 and later taken to the police. Going by the testimony of PW3, it is evident that PW1 did not specifically mention the name of the appellant to PW3. Indeed, the evidence on record does not point out how PW1 described the nature and physical appearance of the appellant to PW3.

Furthermore, the issue of the identity and how the appellant was arrested is clouded by doubt due to the fact that nobody from the police testified at the trial court. However, at the trial the case was prosecuted by Inspector of Police Kidolezi. This throws in some questions on the arrest of the appellant and the involvement of the police in investigation of the alleged crime. It is also not clear whether he was either identified by PW1 physically and by his name at the scene of the crime or after his arrest as stated by PW3. It follows that the evidence of PW2 and PW3 cannot corroborate PW1's evidence on the issue of identification.

In the event, failure of the victim (PW1) to mention specifically the nature and name of the appellant to PW2 and PW3, casts doubt which must be resolved in favor of the appellant. It must be insisted once again that naming and describing the nature of the suspect at the earliest opportunity, is the most important thing when it comes to proper identification of the offender. This Court has made several pronouncements on this matter which are worth referring for the purpose of guidance.

In **Marwa Wangiti Mwita and Another v. Republic** [2002] TLR 39, the Court stated as follows;

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

Yet, in **Phillipo Rukandiza @ Kichwechembogo v. Republic**, Criminal Appeal No. 215 of 1994, (unreported) it was stated that:

*"The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if in all the circumstances there was*

*really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled. There could be a mistake in identification notwithstanding the honest belief of truthful identifying witness”.*

Furthermore, in **Raymond Fransic v. Republic** (1994)

TLR 100, the Court held that;

*“...it is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favoring a correct identification is of the outmost importance”.*

In the present case, the trial court found that PW1 mentioned the accused by name.

However, taking cognizance of the sound principles developed by the Court and the circumstances of this case, we are inclined to agree with Mr. Muggo that the prosecution did not prove that PW1 properly identified the appellant at the scene of the crime beyond reasonable doubt. Failure of PW1 to describe and name the appellant properly implies that it might have been any other person who was involved in raping her.

In view of what we have stated above, we entertain no doubt that both courts below, with respect, wrongly came to the concurrent finding that the appellant was properly identified as the perpetrator.

Having found that the evidence concerning identification cannot be sufficient to support conviction and sentence of the appellant, what remain is the evidence of Dr. Julius Godian Mpenda (PW4) who examined PW1 and whose his report contained in PF3 was admitted as exhibit P2. The trial court also admitted a tooth which was extracted after PW1 was injured as exhibit P1. However, his evidence and exhibits P1 and P2 cannot ground conviction of the appellant without corroborating other evidence. We therefore think that the ground on failure of PW1 to identify the appellant, suffices to dispose of the appeal. We thus need not consider the remaining grounds of appeal. All in all, we are satisfied that the prosecution did not prove the case against the appellant to the required standard.

Before we conclude our judgment, we wish to observe, albeit in passing, that the integrity of Criminal Justice System, depends on among others, the proper court record management. Court record represents the official legal records of a judicial system. Proper court

record management plays a significant role in supporting the justice system. Court record provides critical evidence that a particular action or transaction took place and can be used as evidence. Criminal casefiles, for example, contain the original criminal charge, proceedings and record of conviction and sentence. In this regard, having accurate names and particulars of parties and witness in the court record, is the most important thing in the administration of criminal justice.

The fact that court record is available to any body, especially in the current era of Information Communication Technology, calls for everybody in the justice system to ensure that what is entered in the court record is accurate. Inaccurate particulars involving, for example, names of the parties and witness, may point a different picture of a person in a criminal trial. We hold a firm view that without reliable and authentic record, proper administration of criminal justice cannot be a reality and as a result offenders can be set free while the victims are denied justice.

In the final analysis, we allow the appeal, quash conviction and set aside the sentences imposed on the appellant.

We further order the immediate release of the appellant from prison unless otherwise lawful held for other causes.

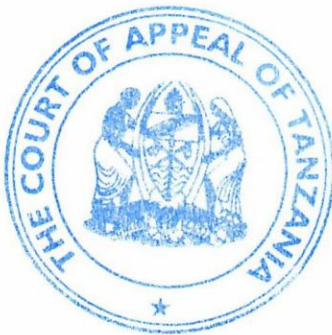
**DATED at MTWARA** this 23<sup>rd</sup> day of February, 2019


I. H. JUMA  
**CHIEF JUSTICE**

R.E.S. MZIRAY  
**JUSTICE OF APPEAL**

F.L.K. WAMBALI  
**JUSTICE OF APPEAL**

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



  
A.H. MSUMI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**