IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MWANGESI, J.A., MWANDAMBO, J.A. And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 32 OF 2017

THABIT DOTTO .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tabora)

(Utamwa, J.)

dated the 14th day of December, 2016
in
Criminal Appeal No. 91 of 2016

....

JUDGMENT OF THE COURT

18th & 24th November, 2020

LEVIRA, JA.:

The appellant, Thabit Dotto was arraigned before the Resident Magistrates' Court of Tabora at Tabora facing a charge of rape contrary to sections 130 (2) (a) and 131 (1) of the Penal Code, Cap 16 RE 2002. Upon full trial, he was convicted and sentenced to serve thirty (30) years in prison. Dissatisfied with both the conviction and sentence, the appellant appealed to the High Court of Tanzania at Tabora via DC. Criminal Appeal No. 91 of 2016 in vain; hence, the current second appeal.

Before we address the issues of contention raised in the memorandum and supplementary memorandum of appeal, we think it

is necessary to unveil the facts of the case. It was alleged that on 20th November, 2014 the victim (PW1) was riding a bicycle from Kalunga to Isenga village within Uyui District, in Tabora Region. On the way near a bush, she met the appellant who stopped her and took her in the bush far from the road. While in the bush, the appellant undressed PW1, he as well took off his clothes and had sexual intercourse with PW1 without her consent. Having finished to rape her, the appellant searched PW1 in her pockets, took her money (Tshs. 8,000/=), cellphone and the bicycle and ordered her to run away. It was alleged further that, while running PW1 met with two people who assisted her to trace the appellant but in vain. They took PW1 to the police to report the incident. At the police PW1 was issued with a PF3 for treatment by a police officer, No. G. 4429 D/Constable Deograss who also happened to be an investigator in this case. PW1 went to Isenga Dispensary where she was attended by Dr. Davis Ogari (PW3) on the same day that is; on 20th November, 2014. According to PW3, PW1 had bruises on her hands, mucus and sperms in her private parts suggesting that she had been penetrated. It was PW1's further evidence that on 7th May, 2015 while she was at Ilolangulu Centre taking her breakfast, she saw the appellant coming to that restaurant and he ran away. He was chased and arrested by Ally and other people who later took him to the police.

On the same day when the appellant was arrested (7th May, 2015), while at home, PW2 received a phone call from his fellow police officer requesting him to go to the office. Upon arriving there, he (PW2) found PW1 who informed him that the suspect had already been arrested and kept in a lock up. PW2 saw the appellant and the identifications he was told by PW1. During trial, PW2 identified the appellant at the dock to be the one whom he saw in the lock up.

The appellant denied to have been involved in commission of the alleged offence. He claimed that he was arrested while at Ilollangulu, taken to the police and subsequently, to the court where he was charged as introduced above. On 2nd May, 2017 the Appellant lodged a memorandum of appeal comprising of five grounds and on 12th November, 2020 he lodged a supplementary memorandum of appeal mainly comprising of legal points.

In the memorandum of appeal, the appellant is challenging the decisions of both the lower courts. The grounds of appeal presented before us for our determination are summarized hereunder:

1. That, the charge against the appellant was not proved beyond reasonable doubt.
2. That, the identification evidence of PW1 was not sufficient to ground the appellant's conviction.

3. That, the appellant's conviction was wrong because the material witnesses were not called to testify before the trial court.
4. That, the prosecution witnesses gave a contradictory evidence.
5. That the prosecution evidence was fabricated by the planted witnesses against the appellant.

The legal points raised in the supplementary memorandum of appeal are quoted seriatim as follows:

1. "That, the appellant was subjected to unfair trial as at the beginning or commencement of trial by receiving the evidence for the prosecution, was not arraigned by putting the substance of the charge and require him to plead.
2. That, the appellant was denied a fair trial in that, although the appellant gave his defence upon affirmation, his rights on options available to him to give his defence were not explained in full to him.
3. That, the first appellate Judge erred for failure to note that during the trial of the appellant the provisions of section 210 (3) of the CPA, Cap 20 RE 2002 was not observed by the trial court, this alone undermined the trial of the appellant and rendered it a nullity.

4. That, the credibility of PW1, the victim of rape, was not properly determined when assessing the coherence of her testimony in that the charge sheet merely particularized the offence of rape whereas the evidence of PW1 shows that she was raped and robbed her properties, this one undermined the credibility of the victim of rape, PW1."

At the hearing of the appeal, the respondent/ Republic was represented by Mr. Rwegira Deusdedit, learned Senior State Attorney. The appellant appeared in person, unrepresented. He adopted his grounds of appeal and opted to hear from the respondent's counsel first as he reserved his right to make a rejoinder.

It is noteworthy that, initially, Mr. Deusdedit opposed the appeal but later upon reflection, he supported it. At the beginning, Mr. Deusdedit argued firmly that, all the grounds of appeal raised by the appellant in the supplementary memorandum of appeal, except the fourth ground, which he said was new, are baseless. It was his argument that those legal points raised are procedural irregularities curable under the law and they did not prejudice the appellant in any way.

Regarding the first ground in the supplementary memorandum of appeal, the learned counsel said, the law does not put it as a

mandatory requirement for the appellant to be reminded of the charge before commencement of trial. He went on stating that, on 12th May, 2015 the charge sheet was read over to the accused person (the appellant) and he entered a plea of not guilty as it is reflected on page 3 of the record of appeal. He also submitted that, on 28th October, 2015 the appellant was reminded of the charge he was facing (see page 12 of the record of appeal). Therefore, Mr. Deusdedit argued, failure to read over again the charge sheet before PW1 testifying was not fatal and the same did not prejudice the appellant as he was aware of the charge he was facing. In the alternative, he argued, even if there was procedural irregularity committed by the trial court, it was not fatal and thus this ground of appeal is baseless. In support of his argument he cited the case of **Charles Bode v. Republic,** Criminal Appeal No. 46 of 2016 (unreported).

Submitting on the second ground of appeal in the supplementary memorandum of appeal, Mr. Deusdedit stated that, although the record is silent as to whether or not the trial court complied with section 231(1) of the Criminal Procedure Act Cap 20, R.E. 2019 (the CPA), the appellant's statement found at page 22 of the record of appeal suggests that the trial Magistrate complied with that provision

of the law. He highlighted that, the appellant's response that he would defend himself and call witnesses and that he would not be having exhibits to tender could not come out of the blue if the appellant was not informed of his rights as per the requirements of the law. He cited the case of **Bahati Makeja v. Republic,** Criminal Appeal No. 118 of 2006 (unreported) to support his argument. In addition, he submitted that if the Court will find that the trial Magistrate did not comply with the requirements of the law, the said irregularity is curable under section 388 of the CPA.

Regarding the third supplementary ground of appeal, Mr. Deusdedit admitted that the record does not indicate that section 210 (3) of the CPA was complied with by the trial magistrate after recording prosecution evidence. However, it was his submission that, the said omission did not prejudice the appellant and the same is curable under section 388 of the CPA and the overriding objective. He added that, after all, there was no any prosecution witness who complained that his evidence was not properly recorded.

The learned counsel refrained from submitting on the fourth supplementary ground of appeal because it was a new ground as the same was not raised and determined by the High Court (the first appellate court).

Subsequently, Mr. Deusdedit reverted to address the appellant's grounds of appeal appearing in the memorandum of appeal. He opted to address them generally as he said all of them fall under a complaint on improper identification of the appellant by PW1, which allegedly led to the appellant's conviction.

As intimated earlier, Mr. Deusdedit commenced his submission by opposing the appeal, but later he changed his stance and supported it on account that the appellant was not properly identified by PW1 at the scene of crime. Submitting on the appellant's identification, Mr. Deusidedit stated that although at page 59 of the record of appeal, the first appellate Judge discussed at length regarding the identification of the appellant by PW1, the said identification was weak. He demonstrated that, in her evidence, PW1 described the features of the man who raped her as it can be seen at page 19 of the record of appeal. That, the said man was black and he had a scar at his left side of the mouth. Immediately after the incident, PW1 was taken to the police by two people where she reported the incident to a police officer No. G. 4429 D/Constable Deograss (PW2). In his evidence, PW2 stated that PW1 told him that the man who raped her was black with red eyes. Mr. Deusdedit noted that, PW1 did not tell PW2 about the scar allegedly seen at the left

side of the mouth of the man who raped her. It was his argument that the only description that remains is that the man who raped PW1 was black. He argued that, PW2 being the first person to be informed by PW1 about what had happened to her on the material day, he ought to have a clear evidence on the physical features of the man who raped her, but that was not the case.

Besides, Mr. Deusidedit submitted that, the evidence of PW1 was quite doubtful on her identification of the appellant at the scene of crime and on the day of his arrest. He referred us to page 16 of the record of appeal where PW1 testified to the effect that, on 7th May, 2015 she was at Ilolangulu Centre taking breakfast and she saw the appellant coming to the said restaurant and he ran away. Luckily, he was chased and arrested by Ally and other people. The learned counsel argued that, since the said Ally was not called to testify, the evidence of PW1 remained doubtful as there was a possibility that she mistakenly identified the appellant. In the circumstances, he supported the appeal and urged the Court to allow it.

On his part, the appellant had no rejoinder to make.

We have carefully considered the record of appeal, grounds of appeal and the submission by the counsel for the respondent. In

general, the appellant's grounds of appeal are twofold. The first limb comprises of grounds falling under procedural irregularities and the second limb are those grounds challenging the identification of the appellant at the scene of crime as presented in the supplementary memorandum of appeal and the memorandum of appeal respectively.

In the first limb the appellant complained that during trial there were procedural irregularities committed by the trial magistrate which led to unfair trial. Responding to the complaint that the appellant was not reminded the charge, the counsel for the respondent argued and we agree that, this complaint is baseless. The law does not require the charge to be read again before the witnesses start to testify. It is our observation that although the appellant complained that he was not reminded of the charge he was facing, he managed to defend his case stating that he was not involved in committing the alleged offence and he also called his witness (Dotto Kamalila – DW2) to testify for him. On page 24 of the record of appeal, while being cross-examined the appellant said, *"when we reached at the police there were (sic) one mom who said I raped her, there after I was kept in the lock up."*

The excerpt above is a clear evidence that the appellant understood the charge he was facing. Apart from that, the appellant

did not state how he was prejudiced for not being reminded of the charge he was facing when the trial was about to commence and / or which law was infringed. In the circumstances, we do not find merit in this ground of appeal and therefore we dismiss it.

Another thing complained of by the appellant is that he was not accorded his rights under section 231(1) of the CPA of knowing his rights before giving his evidence; how he should give his defence, whether he had a right to call witnesses and tender exhibits. Responding on this ground, Mr. Deusdedit admitted that the record of appeal does not show directly that the appellant was informed about his right under section 231(1) which provides as follows:

> *"At the close of the evidence in support of the charge, if it appears to the court that the case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right-*
>
> *a) to give evidence whether or not on oath or affirmation, on his own behalf; and*

b) to call witnesses in his defence,

and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."

However, in the light of the above quoted provision, Mr. Deusdedit, argued, which we agree, that the appellant's statement at page 22 of the record of appeal that he would defend his case, call a witness and would not be having any exhibit to tender, is a clear indication that he was informed of his rights under the law. We are of the considered opinion that the appellant was accorded an opportunity to defend his case according to the law and we do not find any justification of impeaching the court record. We are fortified by the previous decision of the Court in **Iddy Salum @ Fredy v. Republic**, Criminal Appeal No. 192 of 2018 (unreported) where while dealing with almost similar complaint the Court stated:

"It is clear that, from the record, the trial magistrate complied with the requirements of section 231 (1) of the CPA including reading of the substance of the charge to the appellant.

The contention by the appellant has the effect of challenging the contents of the record by way of an appeal. However, ***the principle as regards a court record is that the same is taken to reflect a true position of what took place during the conduct of the proceedings and cannot be lightly impeached."*** [Emphasis added].

(See also: **Halfani Sudi v. Abieza Chichili** [1998] TLR 527).

For the sake of argument, if at all it was true that the appellant was not addressed under section 231(1) of the CPA, which we do not agree, he failed to state how and to what extent he was prejudiced by such failure. In the circumstances, we entertain no doubt that the appellant was not prejudiced and thus this ground of appeal fails.

The third complaint in the supplementary memorandum of appeal was that the trial court did not comply with section 210 (3) of the CPA which requires the evidence to be read over to the witness after being recorded. Much as we agree with the appellant that the record does not show that the trial magistrate complied with the requirements of that section while recording the prosecution evidence, the said fact is not true as far as the defence case is concerned. In our view, it was not proper for the appellant to generalize his complaint.

Since the appellant made a blanket claim without indicating how he was affected by such omission by the trial court, we find that the omission did not cause miscarriage of justice on the part of the appellant. We observe that there was no such complaint from the prosecution witnesses. We are settled that the omission by the trial court to read out prosecution evidence after recording it from each witness is an irregularity which is curable under section 388 of the CPA; as the Court decided in the case of **Paul Dioniz v. Republic**, Criminal Appeal No. 171 of 2018 while quoting with approval the case of **Flano Alfonce Masalu @ Singu v. Republic**, Criminal Appeal No. 366 of 2018 (both unreported), that:

> *"If we may go further and ask ourselves whether non-compliance of section 210 (3) of the CPA prejudiced the appellant to the extent that it occasioned miscarriage of justice, our answer would be in the negative. This is so because such anomaly can be cured under section 388 of the CPA. On this we are guided by the case of **Flano Alphonce Masalu @ Singu v. Republic**, Criminal Appeal No. 366 of 2018 (unreported)...."*

For the reasons we have endeavoured to state above, the third ground of appeal in the supplementary memorandum of appeal is without merits. The same is also dismissed.

We now revert to address the second limb of appellant's complaint found in the memorandum of appeal. As intimated earlier, the main appellant's complaint falls under visual identification. Therefore, we shall direct our mind on the main issue as to whether the appellant was properly identified at the scene of crime.

In **Waziri Amani v. R** (1980) TLR 250 it was held 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 is watertight. The following factors have to be taken into consideration, the time the witness had the accused under observation, the distance at which he observed him, the condition in which such observation occurred, for instance whether it was day or night (Whether it was dark, if so was there moonlight or hurricane lamp etc) whether the witness knew or has seen the accused before or not."*

We wish to observe at the outset that, the position of the law set in the above decision should not be misconstrued. It has to be very clear that the principles stated in the case of **Waziri Amani** (supra) are not only applicable in cases which occur in night times as wrongly considered in some cases including the current one, but also in day times. With that understanding in mind, each case should be determined in accordance with its peculiar circumstances when the question of identification arises.

In the light of the above position, we find it apposite to highlight albeit briefly the grounds raised in the memorandum of appeal. In the first ground, the appellant claimed that the first appellate court wrongly upheld the decision of the trial court because the charge against him was not proved beyond reasonable doubt. The reasons behind the complaint have been stated in other grounds of appeal to the effect that, PW1's evidence on the identification of the appellant at the scene of crime was weak. According to the appellant, PW1 failed to properly describe the physical features of the man who raped her apart from stating that he was black and was having a scar on the left side of his mouth (second ground). In re-examination on page 17 of the record of appeal, PW1 stated that she did not know the man who raped her. PW1 testified that while she was running after being raped,

she met two people to whom she explained what had happened and they took her to the police. But for the reasons best known to the prosecution, the said two people were not called as prosecution witnesses to testify. Regarding the arrest of the appellant, PW1 testified further that, on the date of his arrest, the appellant was chased by various people including one man by the name of Ally. Just like those two people who came to PW1's rescue, the said Ally was not called as a witness to corroborate PW1's evidence, (the third ground of appeal).

According to PW1, when she went to the police to report the incident, she found PW2. Having narrated to him what had happened to her, PW2 gave her a PF3 and went to the hospital for treatment. In his evidence, PW2 stated that PW1 told him that the man who raped her was black with red eyes. This evidence is a different version from that of PW1 who said that the man was black and was having a scar on the left side of his mouth. The question raising doubt according to the appellant lies in the variance of evidence between PW1 and PW2 if at all the rapist was properly identified (ground four). In total, the appellant could not escape the conclusion that the case was fabricated against him (fifth ground of appeal).

From the record of appeal and submission by the counsel for the respondent, we note that there is concurrent findings of facts by the trial court and the first appellate court in relation to visual identification of the appellant to be the person who raped PW1 on the material date. The trial court noted on page 44 of the record of appeal that, the commission of crime took place at noon and PW1 walked in a bush for about 30 minutes with the appellant so she had ample time to identify him. A similar observation was re-affirmed by the first appellate court as reflected on page 60 of the record of appeal where the learned Judge stated:

> *"It is clear that PW1 properly identified the appellant on the material date on the following grounds; in the first place, the event occurred in the broad daylight. She also had ample time to observe the appellant as she testified that she remained under his restraint for about half an hour. She could even see his scar on the left side of his mouth."*

The law is settled that on concurrence of findings of facts by courts bellow the principle has always been that in appeal against findings of fact, this Court will be hesitant to disturb those concurrent findings of facts. The Court will only disturb the concurrent findings if they are unreasonable or where it is evident that some material points

or circumstances were not considered. (See **Masumbuko Charles v. Republic**, Criminal Appeal No. 39 of 2000 (unreported)).

We think that despite the concurrent findings of the trial court and the first appellate court, it is proper for this Court to reevaluate the evidence afresh and come to our own conclusions. The reason behind is that, we have observed that PW1's visual identification of the appellant was not proper. Besides, there were inconsistencies between the evidence of PW1 and PW2 on description of the appellant.

When the first appeal was placed before the High Court, the issue concerning appellant's identification at the scene of crime was raised and determined. The learned Judge had this say:

> *"The major challenge to the prosecution evidence by the defence is that **there was no proper identification of the appellant by PW1.** The challenge is conceded by the learned State Attorney as shown above. In the first place I must declare here that the fact that there is consensus by the parties in this appeal is not a reason why I should allow this appeal. I will still examine the evidence on record and make my own finding."* [Emphasis added].

The learned first appellate Judge went on stating that:

> "*In my view, though there is no doubt that the appellant was a stranger to the PW1 on the material date, the* ***issue of identification does not arise since according to her evidence the event occurred in broad daylight.*** *Under such circumstances there are no difficulties in identifying a person though strange."* [Emphasis added].

It is common ground that the offence with which the appellant herein was charged and convicted of was committed at day time but that fact alone does not make it always possible for the victim to properly identify the assailant / rapist as it was presumed by the first appellate court. In **Philip Rukaza v. R,** Criminal Appeal No. 215 of 1994 (unreported) the Court 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.* [Emphasis added].

In the present case, PW1 testified that she did not know the appellant before but the incident took place at day time around 12:00 noon. We wish to observe that, although the incident took place at day time that alone would not necessarily be sufficient as it does not eliminate mistaken identification. PW1 went further and gave undetailed description of the man who raped her, that he was black and was having a scar at the left side of his mouth. The Court in **Ayubu Zahoro v. Republic,** Criminal Appeal No. 177 of 2004 (unreported) quoted with approval the decision by the defunct East Africa Court of Appeal in the case of **Mohamed bin Allui v. Rex** (1947) 9 EACA 72 where it was stated that:

> *"In every case in whlch there is a question as to the identity of the accused, the fact of there having been a description given* ***and the terms of that description are matters of the highest importance of which evidence ought always to be given,*** *first of all, of cause by the person or persons who gave the description and purport to identify the accused, and* ***then by the person or persons to whom the description was given."*** [Emphasis added].

The Court applied the above established principles in the case of **Ayubu Zahoro** (supra) and had this to say:

> *"it seems to us that even though the incident took place around 4:00 pm and these witnesses saw the appellant for the first time, the conditions for identification of the appellant the next day can hardly be said to be favorable. Possibility of mistaken identification could not be ruled out. It would be unsafe to sustain the conviction on such evidence."*

Likewise in the present case, apart from the fact that PW1 testified that the incident took place around 12:00 noon, she said, she reported the incident to the police where she met PW2 and explained to him what had happened to her. PW2 confirmed to have received the information concerning the incident from PW1, but the description of the assailant which he said he received from PW1 was quite different. Part of his evidence is as follows:

> *"I was at the police, complainant came while complained to be raped while she was on the way at Isenga village, she said, who raped her was known to her on face **she said accused is black, with red eyes,** then I gave her PF3 for treatment."* [Emphasis added].

According to the evidence on the record of appeal, PW1 went straight to the police from the scene of crime; therefore, her description of the man who raped her to PW2 ought to have been more detailed. To the contrary, the only description which can be deduced from PW2's evidence is that the man who raped PW1 was black. The evidence that the said man had red eyes came from PW2 who was not at the scene of crime and there is no indication that he was so informed by PW1. Therefore, his evidence in this regard carries less weight.

It was also PW1's evidence that the appellant was arrested after lapse of six months, nevertheless, she was able to recognize him as part of her evidence speaks for itself hereunder:

> *"The accused became arrested on 7/5/2015 I was at Ilolangulu center while I was taking breakfast, while their (sic)* ***I saw that accused coming to that "Mgahawa" and runned (slc) away he was chasen (sic) by Aily and other people and they arrested him while running*** *and took him to police".*
> [Emphasis added].

We take note that although PW1 testified that the appellant was chased and arrested by Ally and other people, neither Ally nor those

other people were called by the prosecution to corroborate PW1's evidence to that effect. Besides, PW1 did not give any description of the appellant which led her to recognize him as a man who raped her on a material date. In **Soda Busiga @ Shija v. Republic**, Criminal Appeal No. 53 of 2012 (unreported) the Court stated that;

> *"the prosecutor is under a prima facie duty to call those witnesses, who from their connection with the issue in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an adverse inference against the prosecution".*

In the current record of appeal, nothing is stated as to why Ally and those other people allegedly chassed the appellant on the material day, were not called by the prosecutor to testify. We take note further that PW2 also testified that he saw the appellant on 7/5/2015 after he was arrested and he confirmed to be the man described to him by PW1. Here are his words:

> *"On 7/5/2015 while I was at home I became called by phone (sic), with my fellow officer who was on duty that I was needed at police when I reached their (sic) I found complainant she told me that they are already arrested*

suspect, and he was already kept into Lock-up, as I saw him, he had identifications as I was told by complainant, the said accused is that one in accused dork (sic)."

The excerpt above indicates that PW2 saw the appellant and he identified him by the features explained to him by PW1. As we intimated earlier, the only feature which was described by PW1 to PW2 according to the record is that the man who raped her was black. The immediate question that follows is whether that was a sufficient description. The answer to this issue is obvious. It cannot be said with certainty that PW1 identified the appellant at the scene of crime while she failed to give a clear description of him. We are settled in our mind that it was not sufficient for PW1 to describe the appellant to PW2 as black man without giving other peculiar features which differentiate him from any other black man. So, notwithstanding the fact that the incident took place at day time, we think, in the peculiar circumstances of this particular case, there was possibility of mistaken identity.

With respect, we differ with the first appellate Judge who was of the view that the appellant was properly identified by PW1 at the scene of crime. We note that the learned Judge imported some of the

facts which we must admit that, we failed to trace in the record of appeal. We wish to quote part of his decision hereunder:

> *"Moreover, there is evidence by PW1 that on the date of the appellant's arrest she identified her at a restaurant and* ***her eyes met with the appellant's eyes who reacted by looking down and running away****. This piece of evidence points that the PW1 had properly identified the appellant on the material date of event.* ***The appellant conduct of looking down and running away from PW1 after seeing her*** *also points to his guilty consciousness. It was inconsistent with a conduct of an innocent person."*

The learned Judge went on stating:

> *"I must also say something about the description of the appellant which PW1 gave to the PW2. Indeed PW2 said the PW1 had informed on the material date that the appellant black with red eyes. He (PW2) did not mention about the scar on the left side of his mouth as the PW1 testified.... In my view, even without describing him, there would still be ample evidence that she had identified him.... The allegation by the appellant that the PW1 might have mistakenly identified him following*

> *the lapse of long time from the date of event to the date of arrest is also overruled by the overwhelming evidence demonstrated herein above. Besides, only about 7 months had lapsed (from the date of event to the date of arrest when the PW1 saw the appellant again after she had seen him at the event).* Emphasis added.

Much as we may agree with the learned first appellate Judge that PW1 being a victim of rape had come very close to the rapist and that the time spent was somehow considerable, we do not agree with him on the issue of description. It is our considered view that in the circumstances of this case where PW1 had spent time with the man who raped her, she stood a better chance of giving a proper description of the rapist including his attire and some other distinct descriptive features which are missing herein. By such failure, doubt as to her identification of the appellant was obvious, which we find, was supposed to be resolved in the appellant's favour. (See **Adam Ally v. Republic**, Criminal Appeal No. 121 of 2002 (unreported)). We are therefore satisfied that, the appellant was not properly identified by PW1 and PW2 as the man who raped PW1 and hence the issues we raised is answered in the negative. We agree with the parties that, the

charge against the appellant was not proved beyond reasonable doubt.

For the above stated reasons, this appeal is merited. We allow it, quash the conviction and set aside the appellant's sentence. We order immediate release of the appellant unless otherwise lawfully held.

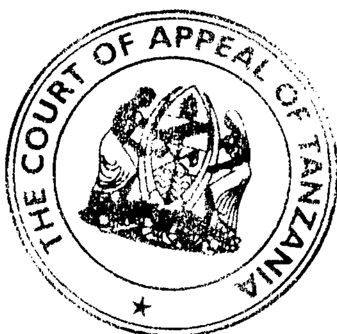
DATED at **TABORA** this 23rd day of November, 2020.

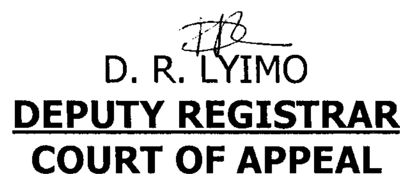
S. S. MWANGESI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 24th day of November 2020, in the Presence of appellant in person and Mr. Tumaini Pius Ocharo State Attorney for the Respondent is hereby certified as a true copy of the original.





D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL