IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

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

CRIMINAL APPEAL NO. 437 OF 2017

MANYANDA NCHEYA.....APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Makani, J.)

dated the 11th day of August, 2017
in
DC. Criminal Appeal No. 14 of 2016

JUDGMENT OF THE COURT

20th & 25th August, 2021.

MUGASHA, J.A.:

The 28th day of October, 2014 was the most unfortunate day for a lady who was raped, her eyes pierced and she became blind. This was a subject of a criminal case against the appellant who in the District Court of Kahama at Kahama was charged with two counts, namely grievous harm contrary to sections 225 and rape 130 (1) (2) (e) and 131 (1) of the Penal Code [CAP 16 R.E.2002]. The charge of rape was wrongly preferred under section 130 (2) (e) instead of section 130 (2) (a) considering that, the victim was a 47 years old woman, a fact known to the appellant throughout the trial. To conceal the identity of the victim, we shall refer to her as F.M or the victim.

The prosecution alleged that on the fateful day at around 19:30 hrs. at Nyambula within Kahama District in Shinyanga region, the appellant did have sexual intercourse with a woman without her consent and subsequently pierced her eyes using a sharp object and caused her to suffer grievous harm.

When the charges were read over to the appellant, he refuted. Subsequently, in order to prove its case, the prosecution paraded five witnesses and tendered two physical exhibits and five documentary exhibits. A brief prosecution account was as follows: The victim and the appellant, both resided in the same hamlet of Ogoni. On the fateful day during noon hours at around 3:30 pm, the victim attended a group gathering and later passed at her sibling's homestead. While returning to her residence she met the appellant on the way. As he went closer to the victim following her, she asked him where he was heading to and he responded. However, he followed the victim and suddenly and strangled her. This made the victim to fall on the ground and the appellant covered her mouth, undressed her and ravished her. He then pierced her eyes with a sharp object suspected to be a nail or a needle and the victim was bleeding, her face was swollen and she became unconscious.

It being at night, the (appellant) victim who had already lost sight had to remain at the scene until the following morning when she heard a sound of passing motorcycle. She attempted to call out twice which was responded to by the voice of one James Mkumbo who went closer to the victim who narrated what had befallen her. Since she could not stand on her own, the said James Mkumbo together with a certain student had to assist her to her residence. The victim recounted to have been aided by moonlight and managed to identify the familiar appellant who was a neighbour whom they conversed before she was raped and she as well recognized his voice in the course of being raped.

While the victim was ailing at her residence, on the same day, her son Sebastian Vicent (PW2) went to see her mother having heard that she was ill and the victim revealed what had befallen her and mentioned the appellant to have raped and beaten her. PW2 decided to follow up the appellant at his residence, he was not there but found his wife washing blood stained clothes of the appellant. Upon being asked on the whereabouts of the appellant, she replied that when he came back at night, he instructed her to wash his blood stained clothes and had left since morning. This made PW2 to report the matter to the Police and he continued to search for the appellant who on 30/10/2014 was arrested at Wandele village with the assistance of the villagers and entrusted to the

police. The blood stained clothes were retrieved from the appellant's residence, and taken to the police and were tendered as exhibit P3 by E. 5222 D/Cpl. Charles (PW3). He stated at the trial court that, upon interrogating the appellant's wife, she revealed that the clothes belonged to the appellant who instructed her to wash the blood stains had left.

D. 4236 D/Sgt. Lwaganga (PW4), a police officer who testified to have visited the victim at Kahama Hospital, recalled to have seen the victim who mentioned the appellant by name to be the assailant. Apart from issuing a PF3 to the victim who was initially receiving treatment at Kahama Hospital, owing to the severity of injuries inflicted, she was transferred to Kolandoto Hospital where both eyes were removed and was admitted at the hospital for a month. At the trial, the blind victim recognized the voice of the appellant and described his appearance and physique when called upon to do so. According to PW4, in the cautioned statement recorded on the 30/10/2014 the appellant confessed to have raped the victim and pierced her eyes. Having overruled the appellant's objection on the admissibility of the cautioned statement, the trial court admitted it in evidence as exhibit P6.

In defence, the appellant denied the accusations by the prosecution. He claimed to have been at his residence on the fateful day. He claimed

to have been arrested on 30/10/2014 while at the Wendele shopping centre, was put under restraint by the villagers and taken to the police station. When cross-examined, he admitted to be familiar with the victim who was able to identify his voice when mixed with other people.

After a full trial, believing the prosecution account to be true, the trial magistrate convicted the appellant as charged and sentenced him to a jail term of two (2) years in respect of the first count and thirty (30) years in respect of the second count. The sentences were ordered to run concurrently. The appellant's appeal before the first appellate court was not successful as the appeal was dismissed on ground that, the charge was proved against the appellant who was properly identified at the scene of crime and confessed to have committed the offence. Still undaunted, the appellant has preferred this appeal to the Court. In the Memorandum of Appeal, the appellant has fronted six grounds of complaint drawn in a typical layman's language as follows: -

1. *That, the both courts below erred in law and in fact after failure to observed and evaluate the cardinal source of the case and convict the appellant without fairness of the law hence based on probabilistic (sic).*

2. *That, the trial court erred in law and in fact to rely on inadmissible identification to the evidence adduced by PW1 using unitisfied (sic) of moonlight.*
3. *That, the trial court erred by law to convict the appellant with null Exhibit P7 which is inadmissible according to TEA Cap 6 RE 2002.*
4. *That, the trial court overlooked and erred to believe violence of PW4 that is credible hence during interrogation stage that PW4 humiliated and prejudice (sic) per DW1 declared see defense statement.*
5. *That, the trial court erred in law and fact to accept Exhibit 1 when tendered to the Court's evidence while it is inadmissible because it has (sic) taken after 48 hours which is contrary to the fairness of the law.*
6. *That, the trial court erred by law and fact to convict the appellant, presented by DW1. With weak evidence adduced by PW1 and PW2 which did not shake at all DW1 defence.*

At the hearing, the appellant appeared in person unrepresented whereas the respondent Republic was represented by Ms. Wampumbulya Shani and Ms. Immaculata Mapunda, both learned State Attorneys.

The appellant adopted the grounds of appeal and opted to initially hear the submission of the learned State Attorney reserving the right to rejoin if need arises. On the other hand, Ms. Mapunda opposed the appeal. She began to address the Court by arguing the 3rd and 5th grounds of appeal in which the appellant is faulting the courts below on the irregular admission of the documentary exhibits which were acted upon to convict him. She pointed out, the statement of the appellant's wife one Amina who could not be found was admitted in evidence in compliance with the provisions of section 34B of the Evidence Act [CAP 6 R.E. 2002]. Clarifying on this, she pointed out that, prior to the tendering of the said statement, statutory notice of ten days was given to the appellant who was addressed in terms of the law, did not make any objection and ultimately, after being cleared for admission, the statement in question was read out to the appellant. As for the cautioned statement, she pointed out that the same was taken on the date of arrest of the appellant and an inquiry following its objection by the appellant but it was overruled as the trial court concluded that it was made voluntarily.

On being probed by the Court if there is any Ruling to that effect she contended that the trial magistrate's order overruling the appellant's objection sufficed as he intimated to give reasons thereto later which he did in the Judgment. We shall address this matter in due course. She also

contended that, since the inquiry was conducted to determine the voluntariness of the cautioned statement of the appellant, this addresses the appellant's complaint in the 4th ground of appeal that he was humiliated in making the confession.

We shall initially dispose of the complaints relating to the procedural irregularities on the admissibility of the statement of the appellant's wife and his cautioned statement because they have a bearing on the propriety or otherwise of the documentary account relied upon by the two courts below to convict the appellant. While the appellant faulted the courts in relying on the statements, the learned State Attorney argued otherwise and stressed that the statements were properly acted upon by the trial and first appellate courts.

It is on record that Amina was the appellant's wife. In terms of section 130 (2) of the Evidence Act [CAP 6 R.E.2002] she was a competent and compellable prosecution witness to testify against her husband, the appellant who was charged with among others, the offence of rape which falls under the offences against morality under chapter XV of the Evidence Act. Thus, Amina was a competent and compellable prosecution witness and her statement could be used as evidence subject to the dictates of the law stated under the provisions of section 34(B) (2) of the Evidence

Act (supra) as amended by Miscellaneous Written Laws Amendment Act No. 6 of 2012 which stipulates:

"A written statement may only be admissible under this section–

> *(a) where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;*
>
> *(b) if the statement is, or purports to be, signed by the person who made it;*
>
> *(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true;*
>
> *(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party*

proposing to tender it, on each of the other parties to the proceedings;

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence: ***Provided that the court shall determine the relevance of any objection.***

(f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read."

It is on record that, **one,** the statement was recorded in compliance with the subsection (c) as the maker made a declaration that what she stated was true to the best of her knowledge and that if it was false she would be liable to prosecution for perjury. **Two,** the statement was signed by the maker in terms of clause (b). **Three,** in terms of clauses (a) and (d), on 15/5/2015, the prosecution informed the trial court that the respective witness had refused to give evidence and as such, notice of the intended use of the statement was given to the appellant who was also served with the copy of the statement. **Four,** the appellant did not raise any objection on the intended use of the statement.

However, it is glaring that the appellant's wife could not read or write. This is reflected at page 62 of the record whereby at the commencement of recording the statement the maker disclosed as follows:

> *"Mimi ndiye mwenye jina na anuani tajwa hapo juu shughuli zangu ni mkulima. Nimezaliwa hapo hapo Nyanghwale (W) hii Kahama sijasoma, nimekulia hapo hapo Nyanghwale....."*

Moreover, being illiterate, she had to affix a right thumb print at the end of the statement and made a similar endorsement in every page of the statement. Finally, the person who recorded the statement did not make a declaration indicating that she had read it to the maker. Instead, she made a following verification:

> *"UTHIBITISHO: Mimi WP 3210 D/Cpl Gumba kwa usahihi na uaminifu nimeandika maelezo ya AMINA d/o MATHIAS kama alivyoeleza yeye mwenyewe k/f 10 (3) CPA (RE. 2002)."*

In the circumstances, in the wake of the appellant's wife being illiterate, section 34B (2) (f) of the Evidence Act was not complied with in the absence of a declaration that it was read to the maker by the person who recorded the statement. It is now common knowledge that all the conditions stipulated in this subsection are cumulative and must be

satisfied by the prosecution before the statement is admitted in evidence. See: **TWAHA s/o ALI AND FIVE OTHERS.** Criminal Appeal No. 78 of 2004 (unreported). Thus, because section 34B (2) (f) was not complied with, exhibit P6, the statement of Amina, the appellant's wife was wrongly admitted and acted upon to ground the conviction and we accordingly expunge it from the record.

We now turn to the cautioned statement of the appellant (exhibit P6) whereby the appellant is faulting the same because it was inadmissible and that he was subjected to humiliation at the time of recording it. It is on record that; the statement was taken on 30/10/2014 soon after the appellant's arrest as acknowledged by him in his defence. The admission of the statement was objected on ground that it was not made voluntary. This was followed by an inquiry and at page 39 of the record the court made the following order:

> *"For factors I will come to explain as we go along with this matter this court overrules the accused objection as to the admissibility of cautioned statement."*

The reasons to the order are found in the judgment. We found this wanting because a ruling on the inquiry and reasons thereto must be given after the conclusion of the inquiry and reasons should be stated. In

future this must rule must be followed. Nevertheless, having overruled the objection, we find that the voluntariness or otherwise of the statement was determined by the trial court. In this regard, like the two courts below, we are satisfied that the cautioned statement of the appellant was legally obtained and it was properly admitted in the evidence. Thus, the 3rd ground of appeal is merited whereas the 4th and 5th grounds of appeal are not merited.

This takes us to the determination of grounds 1, 2 and 6 in which the appellant's basic complaint is that the conviction was wrongly grounded because the prosecution evidence did not prove the charge to the required standard. The learned State Attorney submitted this to be baseless contending that the appellant who was not a stranger to the victim was properly identified at the scene of crime with the aid of moon light. She argued this to be cemented by the appellant's confession that he raped and pierced the victim's eyes. She added that another evidence showing that on the fateful night the appellant was at the scene of crime comes from his wife who upon seeing the blood stained clothes, she inquired from the appellant who was evasive on what actually had transpired and instead, he ordered the wife to wash his clothes.

It is not in dispute that, the victim and the appellant knew each other before the occurrence of the fateful incident on the night of 28/10/2014. It is also not in dispute that the victim was raped and her eyes pierced which caused her to suffer grievous harm and ultimately, permanent disfigurement as she has lost eye sight. The contentious issue here is who was behind what befell the victim. While the appellant is still protesting his innocence that he is not the assailant, the respondent Republic strongly believes that, the appellant's account is not compatible with his innocence. Before making a determination, we wish to restate the accepted practice that a second appellate court should very sparingly depart from concurrent findings of fact by the trial court and the first appellate court unless it is shown that there has been a misapprehension of the evidence; a miscarriage of justice or violation of a principle of law or procedure. (**See: DPP VS JAFFAR MFAUME KAWAWA** [1981] TLR. **149, ISAYA MOHAMED ISACK VS REPUBLIC,** Criminal Appeal No. 38 of 2008 (unreported).

It is also settled law that, although assessing the demeanour of a witness is the domain of the trial court, the first and second appellate courts can assess the credibility of a witness in two ways namely: **One**, when assessing the coherence of the testimony of that witness, **two,**

when the testimony is considered in relation to the evidence of other witnesses, including that of the accused person. See: **SHABAN DAUDI VS REPUBLIC**, Criminal Appeal No. 28 of 2001 (Unreported).

We shall be guided by among others, the said principles in determining the appeal under scrutiny.

The victim's account that she was raped by a familiar person who was a neighbour was akin to identification by recognition. In recognition cases, the victims claim that they are familiar with or know the suspects. The victims would usually claim to be familiar with the voice of the suspect although they may or may not have seen him. The light and intensity of the light, would be assistive. See: **JUMAPILI MSYETE VS REPUBLIC,** Criminal Appeal No. 110 of 2014 (unreported).

Pertaining to voice identification, great care must be taken before the court relying on such evidence because it is generally perceived as the weakest type of evidence as there is always a possibility of imitating another person's voice. See: **NUHU SELEMANI VS REPUBLIC** [1984] TLR 93, and **GERALD LUCAS VS REPUBLIC**, Criminal Appeal No. 220 of 2005 (unreported). However, in the case of **STUART ERASTO YAKOBO VS REPUBLIC**, Criminal Appeal No. 202 of 2004 (unreported), the Court apart from intimating that although voice identification is

reliable in law, is one of the weakest kind and that great caution must be taken to rely on it, the Court further stated: -

> *"... For voice identification to be relied upon,* ***it must be established that the witness is very familiar with the voice in question as being the same voice of a person at the scene of crime."***
>
> [Emphasis supplied]

In the present case, according to the victim the appellant is his neighbour in Goni hamlet. This was admitted by the appellant in the preliminary hearing and his defence in which he confirmed to know the victim. Moreover, prior to being raped and her eyes pierced, the victim was aided by moon light to identify the familiar appellant who went closer to her and they conversed as to where the appellant was heading to. At page 50 when cross-examined by the prosecutor the appellant stated as follows: -

> *"I was very familiar to the victim by face and voice. And she is as well familiar to me by my face and voice."*

Another evidence came from PW2 to whom, the victim narrated what had befallen her and mentioned the appellant on 29/10/2014 which

was less than twenty-four hours after the fateful incident. On this, part of PW2's account is reflected at page 18 of the record as follows:

> *"... while at the farm I received... information that my mother is injured and sick. As I received this information I came and found my mother with injuries. I found my mother's left eye protruded outside and the skin of the right eye swollen to the extent of shedding the eye and she was bleeding on her rear head. When I interviewed her about that, she said was beaten by Manyanda. She also told me she was raped by Manyanda..."*

PW2' s account is supported by D4236 D/Sgt Lwanganga (PW4) who upon being directed by the OC – CID, visited the victim at the hospital on 29/10/2014 and recounted what is reflected at page 31 of the record as follows: -

> *"The way I saw her ...it was infact the eyes which were swollen together with the whole face and head. At that time, I asked on what had befallen her. She said, mentioning the suspect, that raped her and pierced her eyes. She mentioned the assailant to be Manyanda Mchenya..."*

In view of said account from the two witnesses, it is glaring that, at the earliest opportune time, the victim narrated her ordeal and mentioned

the appellant as the culprit. This rendered her account reliable and credible considering the settled position of the law that, the true and best evidence of a sexual offence is that of a victim. See: **SELEMANI MAKUMBA VS REPUBLIC,** [2006] TLR 379. Furthermore, it is the victim's disclosure which made it possible for PW2 to follow up the appellant which facilitated his apprehension. In the circumstances, we are satisfied that the credible account given by the victim, PW2 and PW4 is entitled to credence considering that, each witness was consistent and coherent throughout the trial and such account was not materially contradicted by any other witness including the appellant. See: **GOODLUCK KYANDO VS REPUBLIC** (2006) TLR 363 and **MATHIAS BUNDALA VS REPUBLIC,** Criminal Appeal No. 62 of 2004 (unreported). The prosecution account as corroborated by PW2 and PW3 is further corroborated by appellant's confession on what befell the victim which is to the effect that he raped the victim and pierced her eyes. Thus, we are satisfied that, the appellant was sufficiently identified by the victim before she was raped and her eyes pierced.

The other account is that of E5222 D/CPL Charles (PW3) who after being informed by PW2 that the appellant's wife was found to be washing his blood stained clothes, recalled to have retrieved the blood stained clothes from the house of the appellant. At the appellant's homestead, his

wife revealed that the appellant had left and instructed her to wash his blood stained clothes. We gathered this has a lot to do with the conduct of the appellant after committing the offences and it leaves a lot to be desired. It is very likely that the appellant wanted to conceal the evidence so as to make sure that the fateful incident goes unnoticed. This is not compatible with the innocence of the appellant who committed the barbaric and evil act without the consent of the victim which can be discerned from the injuries sustained by the victim causing loss of eye sight.

We have also gathered that, at the trial the appellant raised a defence of *alibi* to the effect that on the fateful day he was at his residence and did not go anywhere. This was not considered by the trial court and the first appellate court. This was a serious misdirection on the part of the trial court and it missed the eye of the first appellate court who ought to have re-evaluated the trial evidence and if necessary make its own conclusion thereto. On our part, we invoke the provisions of section 388 of the CPA so as to do what ought to have been done by the High Court. Having considered the appellant's defence of *alibi* together with the victim's account, we are satisfied that, the appellant's defence of *alibi* is far from impeaching the credible account of the victim who testified to

have identified the appellant and as earlier stated, mentioned him at the earliest moment to PW2 and PW3.

All said and done, we are satisfied that, the charge of grievous harm and rape were proved against the appellant beyond reasonable doubt. Therefore, the appeal is without merit and it is dismissed in its entirety.

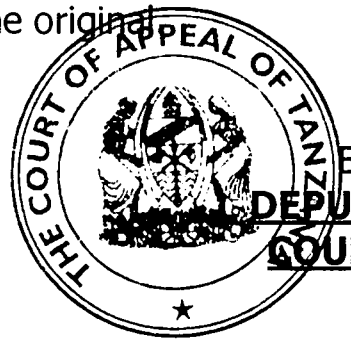
DATED at **SHINYANGA** this 24th day of August, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 25th day of August, 2021 in the presence of Appellant in person, and Ms. Wampumbulya Shani learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL