**IN THE COURT OF APPEAL OF TANZANIA**

**AT MUSOMA**

**(CORAM: NDIKA, J.A., KOROSSO, J.A., And MAKUNGU, J.A.)**

**CRIMINAL APPEAL NO. 132 OF 2020**

**EMMANUEL S/O MATHIAS ..... APPELLANT**

**VERSUS**

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

**(Appeal from the Judgment of the Resident Magistrate's Court of Musoma at Musoma)**

**(Hon. I.E. Ngaile, RM – Ext. Juris.)**

**dated the 2nd day of December, 2019**
**in**
**Criminal Appeal No. 40 of 2019**
**.....**

## JUDGMENT OF THE COURT

31st May & 7th June, 2022

**NDIKA, J.A.:**

The appellant, Emmanuel s/o Mathias, was convicted by the District Court of Musoma of burglary, on the first count, contrary to section 294 (1) (a) of the Penal Code, Cap. 16 R.E. 2019 ("the Penal Code") and rape, on the second count, contrary to sections 130 (1), (2) (a) and 131 (1), (2) (a) of the Penal Code. The convictions earned him five years jail term, on the first count, and thirty years' imprisonment, on the second count. Apparently, the record is silent on the order in which the two terms were

to be served. The appellant's first appeal bore no fruit, hence this second and final appeal.

The prosecution relied upon the testimonies of five witnesses supplemented by one documentary exhibit to establish the accusation, on the first count, that the appellant, on 5th July, 2017 at Kwibara village within Musoma District in Mara Region, broke and entered into the house of one Neema d/o Matwema at night and committed an offence therein, to wit, rape. As regards the second count, the allegation was that the appellant, on the same day and at the same place, had carnal knowledge of one Neema d/o Matwema without her consent.

The testimonies of the prosecution witnesses, woven together, present the following narrative: on 5th July, 2017 in the wee hours of the morning, around 3:00 a.m., PW2 Neema d/o Matwema woke up from sleep only to find her parents' home at Mugango Kwibara village in which she was staying had been invaded. The intruder gained ingress after smashing the main door open. According to her, the invader got into her bedroom, wielding an axe, a machete and a knife, demanding that she give him money or else he would rape her. He approached and held her

as he threatened to kill her. Eventually, he stripped her naked, removed his clothes and raped her until he ejaculated. Again, he had sexual intercourse with her for the second time a few moments later. A little later, the invader left the scene of the crime.

PW2 named the appellant as the invader, claiming that, with the aid of solar power light that illuminated the bedroom, he saw him there in a green shirt and a pair of jeans. She said that she knew him well as husband to one Mwadawa d/o Juma, a neighbour, with whom he used to visit her parents' home. The incident, she added, lasted over thirty minutes.

After the invader had left, PW2 and her younger brother, Emmanuel Matwema (PW3), who was also in the home, raised an alarm. She named the appellant as the perpetrator of the crime to a number of neighbours who responded that morning to her distress call. She also made a brief statement to the police who attended the scene that morning before she went to Nyasho Health Centre at Musoma for medical examination. PW3's evidence materially supported his elder sister's account. In essence, he told the trial court in detail that he saw the appellant entering into his sister's bedroom and later watched him raping her.

Kambarage Mwikwabe (PW4), a leader of the neighbourhood crime watch, was one of the neighbours who went to the scene of the crime in response to PW2's alarm. He adduced that he found the home broken into and learnt that a woman, whose name he did not mention, had been raped. Most tellingly, he said that the woman immediately pointed an accusing finger at the appellant. Subsequently, they traced the appellant at his home but he was nowhere to be seen.

PW1 Dr. Pius Biseko Makena, a Clinician at Nyasho Health Centre in Musoma, attended PW2 on 6th July, 2017 around noon. He tendered his medical examination report (Exhibit P1) indicating that the victim's vaginal area exhibited laceration and redness, which were signs of forceful penetration by a blunt object.

There was further evidence from Police Officer E.6610 Detective Corporal Robert (PW5) who told the trial court that the appellant was arrested at Bunda on 13th July, 2017 and that he took him to Musoma to face the charges the subject of this appeal.

The appellant's defence was essentially a denial of the accusation against him, saying that the charge was a frame up. He interposed an

*alibi*, claiming that on the material day he was in custody at Bunda Police Station.

The trial court (Hon. S.J. Mwakihaba – RM) believed the prosecution's version of the events and held that the charged offences were sufficiently proved. Accordingly, he convicted and sentenced the appellant as alluded to earlier. In his well-reasoned judgment, the first appellate Resident Magistrate with Extended Jurisdiction (Hon. I.E. Ngaile – RM – Ext. Juris.) upheld the convictions and corresponding sentences.

The appeal rests on four grounds of grievance whose thrust is three complaints: **one**, that visual identification evidence was not watertight and that the applicable guidelines for evaluating such evidence were not complied with. **Two**, that the appellant's defence was not duly considered. **Three**, that the prosecution case was not proven beyond peradventure.

We heard the appeal on 31st May, 2022. Before us, the appellant, who was self-represented, simply urged us to allow his appeal and rested his case.

Through the services of Mr. Roosebert Nimrod and Ms. Agma Haule, learned State Attorneys, the respondent strongly opposed the appeal.

Addressing us on the first issue, Mr. Nimrod contended that the appellant was positively identified by the victim who said that she saw and recognised him at the scene, which was illuminated by solar power light. He added that the victim knew the appellant very well for over two years and that she described him by the attire he wore during the raid while armed with a number of weapons including a knife. The incident lasted over thirty minutes with the appellant being in close proximity to the victim as he held and raped her. To her credit, she mentioned the appellant to PW4 as the assailant as soon as he appeared at the scene.

Although initially Mr. Nimrod had suggested that the victim's evidence was fully corroborated by the testimony of PW3 who at the age of twelve years was then a child of tender years, he conceded, upon being queried by the Court, that his evidence was given and recorded on oath contrary to the dictates of section 127 (2) of the Evidence Act, Cap. 6 R.E. 2019 ("the Evidence Act"). He elaborated that the trial court did not inquire into whether the said child witness understood the meaning of oath before it allowed him to give evidence. Accordingly, he urged us to discount PW3's testimony.

Coming to the complaint on the appellant's defence, the learned State Counsel conceded, with remarkable forthrightness, that the trial court did not consider the *alibi* raised that the appellant was in police custody in Bunda at the material time. However, he submitted that the first appellate court redressed the anomaly and dealt with the defence extensively from pages 89 to 91 of the record of appeal. Ultimately, the court rejected the *alibi*.

Still on the aforesaid *alibi*, Mr. Nimrod criticized the appellant for not giving any notice of the intention to rely on the defence of alibi or raising it during the prosecution case in cross-examination. Citing our decision in **Chora Samson @ Kiberiti v. Republic**, Criminal Appeal No. 516 of 2019 (unreported), he argued that the *alibi* ought to have been raised early enough to enable the prosecution to know of it and attempt to rebut it. It was his further contention that apart from the *alibi* being an afterthought, it naturally dissipated in the instant case as there was positive evidence placing the accused at the scene of the crime at the material time as held by the Court in **Edgar Kayumba v. Director of Public Prosecutions**, Criminal Appeal No. 498 of 2017 (unreported).

On whether the charged offences were sufficiently proved, the learned State Attorney was resolute that PW2 was a witness of truth who could not have lied to the responders when she reported to them of having been raped by the appellant after the home was burgled. He referred us to **Chora Samson** (*supra*) on the improbability of a victim of rape lying when naming a suspect at the earliest opportunity. He made further reference to the case of **Magendo Paul & Another v. Republic** [1993] TLR 220 where the Court quoted Lord Denning's passage in the case of **Miller v. Minister of Pensions** [1947] 2 All ER 372 that:

> *"The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, of course, it is possible but not in the least probable the case is proved beyond reasonable doubt."*

Rounding off his submissions, Mr. Nimrod drew our attention to the trial court's omission to order the manner in which the two sentences imposed on the appellant ought to have been served. The omission was not dealt with by the first appellate court. He moved us to invoke our

revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 ("the AJA") to rectify the anomaly by ordering the sentences to run concurrently.

In a brief rejoinder, the appellant referred us to parts of the evidence of PW1 indicating that the victim he attended to was Maria d/o Materema Bhoke, not Neema d/o Matwema. He thus urged us to find PW1's evidence contradictory and unreliable. He finally reiterated his *alibi*, insisting that he was incarcerated at the police station at the material time.

We have examined the record of appeal and duly considered the contending submissions as well as the authorities cited. The appeal, in our view, turns on the issue whether the appellant was positively identified at the scene as the burglar and rapist.

It is common ground that the incident in issue occurred in the small hours of the day, around 3:00 a.m., entailing that the evidence on how the burglar was seen and identified is so crucial. It is apt that we refer to the guidelines on visual identification as stated by the Court in its ground-breaking decision in **Waziri Amani v. Republic** [1980] TLR 250. The Court cautioned, at pages 251 to 252, that:

*"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, 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 before it is absolutely watertight****."* [Emphasis added]

Then, the Court stated, at page 252, that:

*"Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried.* ***We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or***

> ***night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not.*** *These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."* [Emphasis added]

The above guidelines have been re-emphasized in numerous cases including **Said Chaly Scania v. Republic**, Appeal No. 69 of 2005 (unreported) thus:

> *"We think that where a witness is testifying about identifying another person in unfavourable circumstances, like during the night, 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 and its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger."*

The Court underlined in **Raymond Francis v. Republic** [1994] TLR 100 that:

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

See also **Jumapili Msyete v. Republic**, Criminal Appeal No. 110 of 2014; and **Frank Maganga v. Republic**, Criminal Appeal No. 93 of 2018 (both unreported).

With the above guidelines in mind, we subjected the evidence on record to a scrutiny in the light of the concurrent findings of the courts below. Having done so, we agree with Mr. Nimrod that the appellant was positively recognized at the scene of the crime as all possibilities of incorrect or mistaken identification were eliminated. We so hold in view of the following facets of the evidence: **first**, it was unchallenged that PW2 (the victim) knew the appellant very well before the fateful incident as husband to Mwadawa d/o Juma, a neighbour. **Secondly**, PW2 adduced quite vividly that with the aid of solar power light illuminating her bedroom, she saw the appellant in a green shirt and a pair of jeans and recognized him as he brandished an axe, a machete and a knife. **Thirdly**, since it is in the evidence that after threatening to kill PW2, the appellant stripped

the victim naked, removed his clothes and ravished her twice and that the whole incident lasted roughly thirty minutes, it is inferable that the victim had sufficient time to observe and identify her assailant from a very close proximity.

**Fourthly**, we agree with the learned State Attorney that PW4's testimony, that upon arriving at the scene in response to the alarm PW2 named the appellant as the burglar and rapist, guarantees the credibility and reliability of her claim that she recognized him at the scene. Indeed, it is settled that the ability of a witness to mention a suspect at the earliest opportunity is of utmost importance – see **Marwa Wangiti & Another v. Republic** [2002] TLR 39; **Swalehe Kalonga & Another v. Republic**, Criminal Appeal No. 45 of 2001 (unreported); and **Jaribu Abdalla v. Republic** [2003] TLR 271. It is worthy to excerpt our observation in **Jaribu Abdalla** (*supra*) at page 273 thus:

> *"In matters of identification, it is not enough merely to look at facts favouring accurate identification; equally important is the credibility of the witness. The conditions for identification might appear ideal but is not guarantee against untruthful evidence.* ***The ability of the witness***

***to name the offender at the earliest possible moment is, in our view, a reassuring, though not a decisive factor."*** [Emphasis added]

In assessing PW2's credibility, we also took into account the improbability of a victim of rape lying when naming the suspect at the earliest opportunity. In **Chora Samson** (*supra*), relied upon by the learned State Attorney, we excerpted a passage from our decision in **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 (unreported) on probability or improbability of an account according to common experience of humanity that:

> *"In our considered judgment if a witness is not an infant and has normal mental capacity as were PW.1 Massawe, PW.2 Amani, PW.3 Ngasa and PW.5 Lazaro, the primary measure of his/her credibility is* ***whether his or her testimony is probable or improbable when judged by the common experience of mankind."*** [Emphasis added]

We think that the testimony of PW2, an avowed God-fearing person, that she saw and recognized the appellant at the scene deserved full weight and credence additionally because by common experience of

humankind no woman would place herself on public trial for rape where she would be subjected to close scrutiny of her personal life, suspicion, spiteful imputations and scandal, by naming the suspect at the earliest opportunity if she was purely fabricating a story she cannot prove in court.

We are alert that the prosecution presented PW3 as a second identifying witness apart from PW2. At the age of twelve years, PW3 was in the eyes of the law a child witness of tender years. As rightly conceded by Mr. Nimrod, his evidence was given and recorded on oath in contravention of the dictates of section 127 (2) of the Evidence Act, which required the trial court to inquire into whether the said child witness understood the meaning of oath before it allowed him to give evidence – see, for example, **Hamisi Issa v. Republic**, Criminal Appeal No. 274 of 2018; **Issa Nambaluka v. Republic**, Criminal Appeal No. 272 of 2018; and **Twalaha Ally Hassan v. Republic**, Criminal Appeal 127 of 2019 (all unreported). As we held in, for example, **Twalaha Ally Hassan** (*supra*), such evidence is worthless. Accordingly, we are compelled to discount PW3's testimony. However, we hasten to say that the discounting of that evidence has no deleterious effect on the prosecution case as PW2's

testimony, on its own, sufficiently placed the appellant at the scene of the crime at the material time. The ground of appeal under consideration fails.

We turn to the complaint about the appellant's defence of *alibi*. We hinted earlier that the learned State Attorney candidly conceded that the trial court did not consider the *alibi* that the appellant was in police custody in Bunda when the alleged offences were committed. Nevertheless, we agree with him the first appellate court noted the irregularity and redressed it by dealing with the defence extensively from pages 89 to 91 of the record of appeal. The court ultimately rejected the *alibi*.

The first appellate court took that course, rightly so, despite the appellant failing to furnish due notice of his intention to rely on the defence of *alibi* in terms of section 194 (4) of the Criminal Procedure Act, Cap. 20 R.E. 2019 ("the CPA"). It is settled that where a defence of *alibi* is given after the prosecution has closed its case, and without any prior notice that such a defence would be relied upon, in terms of section 194 (6) of the CPA the trial court is not authorized to treat the defence as if it has never been made but that it must take cognizance of it and may exercise its discretion to accord it no or less weight – see, for instance, **Charles**

**Samson v. Republic** [1990] TLR 39; **Mwita s/o Mhere & Ibrahim Mhere v. Republic** [2005] TLR 107; and **Marwa Wangiti** (*supra*).

In the circumstances of this case, we are in accord with the learned State Attorney that the *alibi* in issue was an afterthought mainly because it was never laid out during cross-examination of prosecution witnesses who included the arresting police officer (PW5). The appellant had no duty to prove his *alibi* as we held in **Sijali Juma Kocho v. Republic** [1994] TLR 206 but it defeats common sense and prudence that he did not ask PW5 any question that would laid bare his claimed incarceration in a police cell at Bunda at the material time. It should be recalled that it was PW5 who took the appellant from Bunda Police Station on 14th July, 2017 to Musoma after his arrest the previous day.

Besides, in view of the impeccable evidence of the identifying witness placing the appellant at the scene of the crime, the *alibi* would naturally dissipate as we held in **Edgar Kayumba** (*supra*) – see also **Venant Mapunda and Another v. Republic**, Criminal Appeal No. 16 of 2002; and **Fadhili Gumbo Malota & 3 Others v. Republic**, Criminal

Appeal No. 52 of 2003 (both unreported). In the premises, the second ground of appeal collapses.

The final issue whether the charges against the appellant were proven beyond reasonable doubt poses no difficulty. Beginning with burglary, it was undisputed that the dwelling house that PW2 slept was broken into around 3:00 a.m. in the morning and that PW2 recognised the appellant as the man who gained ingress into the home after smashing the main door open with intent to steal therefrom and or commit rape therein. We hold without demur that the appellant's conduct as explained by PW2 fits the gravamen of the offence under section 294 (1) (a) of the Penal Code.

As regards the offence of rape laid under sections 130 (1), (2) (a) and 131 (1) and (2) of the Penal Code, we should, at first, state that the prosecution had to establish that the appellant had sexual intercourse with the complainant without her consent. In other words, the prosecution had to establish that there was penetration into the complainant's vagina, that the sexual intercourse was without the complainant having consented to it, and that the perpetrator of the sexual act was the appellant.

From the record, it is too plain for argument that PW2 gave a graphic, spontaneous and coherent account of what happened after the appellant, who was armed to the teeth, had entered into her bedroom and had sexual intercourse with her twice by force. Settled is the principle that the best proof of rape (or any other sexual offence) must come from the complainant whose evidence, if credible, convincing and consistent with human nature as well as the ordinary course of things can be acted upon singly as the basis of conviction – see, for instance, **Selemani Makumba v. Republic** [2006] TLR 379. See also section 127 (6) of the Evidence Act. In the instant case, the courts below appraised the victim's evidence and gave her full weight and credence. There is no sign that the courts below misapprehended the evidence for us to interference with their concurrent findings.

Moreover, the medical evidence, adduced by PW1 and supported by report (Exhibit P1), materially corroborated PW2's testimony. The finding that her vaginal area exhibited laceration, soreness and redness is consistent with her claim that the appellant had sexual intercourse with her forcefully without her consent.

For the record, we wish to state that we found untenable the appellant's contention in his rejoinder that PW1's evidence was contradictory and unreliable for reason that in his testimony he named the victim he attended to as Maria d/o Materema Bhoke, not Neema d/o Matwema. Indeed, while the typed record of appeal at page 18 reveals the alleged contradiction, it is clear from the handwritten original record that the name of the victim was repeatedly stated Neema d/o Matwema @ Bhoke (PW2). The same name is stated in Exhibit P1. The apparent confusion was, therefore, due to typographical errors.

On the sentences, we are at one with Mr. Nimrod that the trial court irregularly imposed the two sentences without stating the order in which they had to be served. Sadly, that omission escaped the attention of the first appellate court. We, therefore, accept the learned State Attorney's invitation that we invoke our revisional powers to correct the anomaly. For it is firmly settled that generally sentences for offences committed in the course of the same transaction, as happened in the instant case, must be served at the same time barring exceptional circumstances. In the premises, we order, pursuant to our revisional powers under section 4 (2)

of the AJA, that the sentences shall run concurrently with effect from the date they were imposed by the trial court.

For the reasons we have given, we find no merit in the appeal. Save for the aforesaid order on the sentences, the appeal stands dismissed.

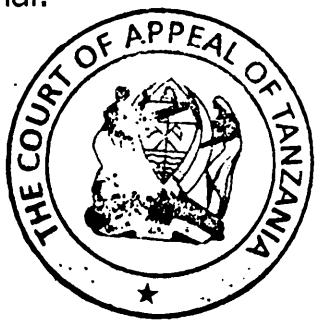
**DATED** at **MUSOMA** this 6th day of June, 2022.

G. A. M. NDIKA
**JUSTICE OF APPEAL**

W. B. KOROSSO
**JUSTICE OF APPEAL**

O. O. MAKUNGU
**JUSTICE OF APPEAL**

The Judgment delivered this 7th day of June, 2022 in the presence of the appellant in person and Mr. Tawabu Yahaya Issa, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




C. M. MAGESA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**