**IN THE HIGH COURT OF TANZANIA**

**AT DODOMA**

**APPELLATE JURISDICTION**

**(DC) CRIMINAL APPEAL NO. 95 OF 2008**

**(Original Criminal Case No. 81 of 2006 of the District Court of Manyoni District at Manyoni)**

**BEFORE N.K. MUNUO ESQ, DISTRICT MAGISTRATE**

**1. MAFUNDE MWALUKO**

**2. MATHAYO STANLEY ........................... APPELLANTS**

**Versus**

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

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**Date of last Order – 10/2/2009.**

**Date of Judgment – 22/4/2009.**

**J U D G M E N T**

**MJEMMAS, J.:**

The appellants Mafunde Mwaluko and Mathayo Stanley [hereinafter referred to as the first and second appellants respectively] were charged, prosecuted and convicted of two counts of armed robbery c/s 285 and 286 of the Penal Code and gang rape c/s 131 A (1) and (2) of the Penal Code, Chapter 16 of the laws as amended by

Act No. 4 of 1998. Each of the appellants was sentenced to a term of thirty years imprisonment for the offence of armed robbery and also thirty years imprisonment for the offence of gang rape. The sentences were ordered to run concurrently. In addition to that each one was ordered to pay Tshs. 150,000/= as compensation to the victims. The appellants were aggrieved hence the present appeal.

The background of this matter is that on 25 April, 2006 at about 9.00 p.m. at Idondyandole village, within Manyoni District in Singida Region PW1 and PW2 were invaded at their hut by three people. PW1 and PW2 were cut in various parts of their bodies and that in the course of the attack PW1 was gang raped. The invaders stole some properties valued at Tsh. 14,000/=. PW2 managed to run away to a neighboring house and shortly thereafter he was joined by his wife. They raised alarm and some villagers responded. The victims were given first aid that night and on the following day the matter was reported to Police. The appellant's were then arrested and prosecuted.

Each appellant has filed a length petition of appeal. During the hearing of the appeal they appeared in person and unrepresented. They did not have anything to add to elaborate the grounds of their appeals. The respondent – the Republic was represented by Mr. Mayeye, learned State Attorney.

Mr. Mayeye, learned State Attorney supported the conviction of the appellants. In his submission he stated that the first appellant was identified by PW1 under the following circumstances. That there was fire which was burning at the scene of incident and that the act of raping PW1 took about one hour and a half and that PW1 spoke to the appellant. While on the issue of identification, the learned State Attorney stated that PW1 and PW2 mentioned the first appellant to the Ward Executive Officer (PW4) as among the people who attacked them. That PW2 also identified the first appellant at the scene of incident. Mr. Mayeye went on to argue that PW4 confirmed what PW1 and PW2 said.

The learned State Attorney said that it is enough for a person to report an incident to any of the Village leaders and not necessarily to a ten cell leader. He was

responding to ground four of the petition of appeal of the first appellant.

On the issue of intensity of the fire as raised in ground five of the petition of appeal of the first appellant, Mr. Mayeye said that PW1 and PW2 said that the fire which was burning was bright enough to enable them to identify the appellants. He also said that the appellants were known to PW1 and PW2 before the incident.

With regard to ground six of appeal by the first appellant, Mr. Mayeye said that it has no merit because the PF.3 which was admitted in court showed that PW1 was raped.

Turning to the second appellant's grounds of appeal, Mr. Mayeye submitted that they have no merit at all. He submitted that the offence of armed robbery was proved to the required standard because there is evidence (PF3) which shows that the victims were injured or had wounds which were inflicted by a sharp object. The learned State Attorney dismissed as an after thought the 2nd appellant's complaint that the PF3 which were produced in court were not proved to have been

written by a medical doctor. He stated that the appellant did not raise any objection when the said documents (PF3) were tendered in court as exhibits.

On the complaint that the evidence of rape was not corroborated, Mr. Mayeye stated that it has no merit because it was corroborated by the evidence of PW2 and exhibit P1 (PF.3).

On the question of identification of the second appellant as raised in his third ground of appeal Mr. Mayeye submitted that the second appellant was well identified because of the light from the burning fire at the scene of incident and that the incident took a long time. He also said that the victims reported the matter to PW4 and they mentioned the second appellant as among the people who attacked them. Mr. Mayeye dismissed the fourth ground of appeal as baseless because he said the place where another suspect died was not relevant to the case facing the appellants.

With regard to the fifth ground of appeal Mr. Mayeye submitted that it has no merit because the case did not depend on the confession made by the 2nd appellant but it depended on the evidence of

identification of the appellants. The learned State Attorney argued further that ground sixth of appeal has no merit because it was not necessary that the victims should report the incident to a ten cell leader and that it was enough for them to report the incident to the Ward Executive Officer (PW4). On the last ground of appeal by the second appellant Mr. Mayeye submitted that it has no merit because the record shows that the trial Magistrate took into account their defence as reflected at pages 4 – 5 of the judgment.

Mr. Mayeye finished his submission by saying that the identification of the appellants was water tight and in accordance with the standards set out in the case of Waziri Amani.

From the evidence on record there is no dispute that the victims that is PW1 and PW2 were on 25.4.2006 in the night [9.00 p.m.] attacked and wounded. There is evidence of PW1 and PW2 who were the victims. Their evidence is corroborated by PW3 – Abeneri Mgaliwa who testified that in the material night PW1 and PW2 went to his house and were in bad condition. They told him that they had been invaded and beaten by bandits while at their farm. There is also evidence of PW4 – Blace

Kapatia, Ward Executive Officer who met/saw the victims the following morning of 26.4.2006 and that they were wounded all over their bodies. In addition to that there is also evidence from the doctor who examined the victims and filled Police Forms No. 3 (PF.3) which were admitted as exhibit PI and PII respectively.

The main issue for determination in this appeal is identification of the appellants. As correctly observed by Mr. Mayeye, learned State Attorney the standards or principles to be applied are set out in the famous case of WAZIRI AMAN V REPUBLIC [1980] TRL 250. It was stated in this case that –

> *"The first point we wish to make is an elementary one and this is 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 ... Now,*

*the extent to which the possibility of the danger of an affront to justice occurring in this type of case depends entirely on the manner and care with which the trial judge approaches his task of analysis and examination of evidence. If the judge does his job properly and before accepting any evidence of identification he goes through a process of examining closely the circumstances in which the identification of each witness came to be made, the dangers of convicting on such evidence are greatly lessened. Although no hard and fast rules can be laid down as to the manner a trial judge should determine question 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 such 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."*

In the present appeal, evidence of identification was given by PW1, Leonia Vicent and PW2 Ernest Samweli who were wife and husband respectively.

Both witnesses said that they were at their farm guarding wild pigs when the incident happened at around 9.30 p.m. They were asleep in their hut and suddenly they were beaten and woke up by three people who they identified as the appellants and another person by the name of Meshaki. According to the witnesses they knew the appellants before. The witnesses said that they managed to identify the appellants by the help of light from a burning fire at the scene of incident. I have critically reviewed this piece of evidence and I am of the opinion that it leaves a lot of questions unanswered. First of all, it is not clear where

was the burning fire. Was it in the hut or outside the hut and how big was the hut? Second, the witnesses said that they were asleep before they were attacked, now the question which arises is what was the intensity of the burning fire. Was it so bright to allow the witnesses to identify the intruders or the appellants as alleged? That does not come out clearly from the evidence of the witnesses. If one may be allowed to venture a little bit, if the witnesses were in a hut built in the farm wouldn't it be too risk to leave strong burning fire while asleep? Third, PW1 said that when her husband (PW2) was fighting with one of the attackers (Meshaki) she ran for about three paces whereby the appellant's gang raped her. She did not say whether there was moonlight or not. Both witnesses said that after they had been attacked they went to the house of one Ebeneri – PW3 to seek help. Alarm was raised and several people respondent. Those who responded to the alarm included Alexander Abeneri, and Petro Mlongoi. According to the evidence of PW2 the second appellant who was the first accused at the trial was among the people who gathered at the house of PW3. Under normal circumstances one would have expected PW1 and PW2 to mention the names of their assailants before the people who responded to the alarm.

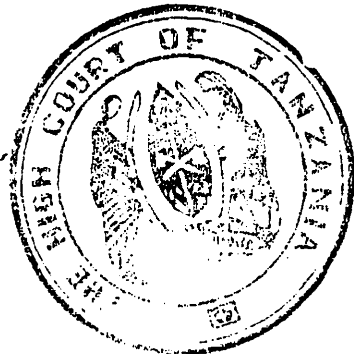
According to the evidence of PW3 the victims (PW1 and PW2) did not mention to him the names of the people who attacked them. They did not mention even the second appellant who was among the people who responded to the alarm. The explanation which was given by PW2 that he did not mention the second appellant that same night because his father is a ten cell leader does not convince me because the record shows that there were several people who responded to the alarm. If Pw1 and PWII identified the culprits or bandits as they claim why didn't they mention them to the people who responded to the alarm that night. The only explanation is that either they were not sure of who attacked them or simply they did not identify anyone. In fact they did not inform PW4 immediately the following morning that they identified the bandits. According to PW4 when he met PW1 and PW2 on 26.4.2006 they showed him two signs that they were wounded by the second appellant – Mathayo who took them to PW4. It was until later when PW4 went to see them (PW1 and PW2) at the hospital that they told him (PW4) that it was the appellants who attacked them. If PW1 and PW2 were at first afraid to mention the names of the people who attacked them why did they fail to

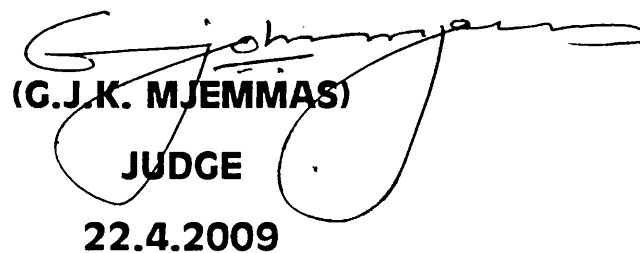
mention them when they were before the Ward Executive Officer (PW4) in the morning of 26.4.2006.

From the circumstances explained above it is my finding that the alleged visual identification by PW1 and PW2 was done under unfavourable circumstances and it was not free from mistaken identity. It is also my holding that the credibility of those two witnesses is questionable. As shown hereinabove one wonders if they correctly identified the appellants why didn't they mention them to the people who gathered to offer help? If they had any valid reason to hide the names that night why didn't they tell the Ward Executive Officer straight away that the second appellant who was escorting them was one of the bandits who attacked them? What were they afraid of? Another thing is that the story of "gang rape" was not mentioned to the people who gathered that night to assist the victims nor was it mentioned to the Ward Executive Officer (PW4) who issued them (victims) with a letter to go to Hospital for treatment. In his evidence in chief PW4 stated *"They told me that they were robbed various properties and that I do not remember another offence which was done to them" PW3 stated in his testimony "On 25/4/2005 during the night I was at my home and came Ernest*

*Samweli a person I know him for a long time and my neighbour. He was in bad condition as he was beaten and he told me that he was invaded by some bandits while at his farm near to my home. He didn't tell me the person who invaded him. After a short time came the wife of him and was in bad condition. I shouted for help ---"*

From the foregoing, this appeal succeeds. The conviction against the appellants is hereby quashed and sentence imposed is set aside. The order of compensation is also set aside. The appellants to be set free forthwith unless held for some other lawful cause. Order accordingly.



**(G.J.K. MJEMMAS)**

**JUDGE**

**22.4.2009**