

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY  
AT MWANZA

APPELLATE JURISDICTION

HC. CR. APPEAL NO. 102 OF 2008

*(Original Cr. Case No. 1353 of 2007 of the District Court of Nyamagana District at Mwanza. Before G. A. Mwambapa, RM)*

MAGIGE GASIAN ..... APPELLANT  
(Original Accused)

Versus

THE REPUBLIC ..... RESPONDENT  
(Original Prosecution)

*20.04.2009 – 24.04.2009*

JUDGMENT

G. K. RWAKIBARILA. J

The appellant **MAGIGE GASIAN** was accused No. 2 in Nyamagana District Court Criminal Case No. 1353 of 2007. He was charged there with three other men of two counts, namely armed robbery and rape c/ss 287 of **The Penal Code, Cap.16 (R.E.2002)** and 130 (3) (a) and 131 of the same Code respectively.

Appellant alone was convicted on the first count of armed robbery and sentenced to thirty years imprisonment without corporal punishment. This is his appeal against both conviction

and sentence alone because his other co-accused were acquitted.

The summary of the evidence which led to appellant's trial and conviction is that by 15.10.2007, **Pw<sup>2</sup> Hoja Peter** and **Pw<sup>1</sup> Florida Peter** were residing together in a family dwelling house along Bugarika suburb within Nyamagana District in Mwanza City. Some members of their family like **Pw<sup>4</sup> Mashiku Peter**, **Pw<sup>5</sup> Hawa Hamadi** and **Pw<sup>6</sup> Janet Joseph** were also residing together with **Pw<sup>2</sup>** and **Pw<sup>1</sup>** in that house.

At around 01:30 AM on that 15.10.2007 day, a group of about six thugs smashed the door of that house, entered that house and demanded money. **Pw<sup>4</sup>**, **Pw<sup>5</sup>**, **Pw<sup>6</sup>**, **Pw<sup>2</sup>** and **Pw<sup>1</sup>** replied those thugs how they did not possess money during that time. But the thugs proceeded to seize two mobile phones, one radio panasonic make, ten pairs of vitenge, five pairs of khanga and a wrist watch whose total value were Shs 420,000/=.

According to **Pw<sup>1</sup>** appellant pulled her from that house to the semi-finished house and forcefully made carnal knowledge with her on rotation basis with another thug whom she did not identify. But on her part, **Pw<sup>2</sup>** narrated that she is the one who was forcefully pulled from that house up to the semi-finished house where appellant and another thug whom she also failed to

identify jointly made carnal knowledge with her on rotation basis before they fled away.

During his defence and in this appeal, appellant narrated how he moved from his home which was not too far from complainant's house but started to run when he saw **Pw<sup>3</sup> Paul Kimaro** approaching him upon mistaking him as one of the thugs. But this **Pw<sup>3</sup>** left appellant alone after he determined that he (appellant) was merely a neighbour and not among the thugs.

Mr. Matuma, learned state attorney who appeared for the Republic in this case did not support the conviction. He put it, **inter alia**, that there were a lot of contradictions in the evidence of prosecution witnesses like **Pw<sup>1</sup>** and **Pw<sup>2</sup>** because each of them contended that she was the one who was pulled to the semi-finished house and raped by appellant and another thug on rotation basis.

Credible female witnesses could not have scrambled to depose that they are the ones who were raped. In the material case, it happened that **Pw<sup>1</sup>** and **Pw<sup>2</sup>** testified separately to show that each was the one who was raped. This is a sufficient reason to discredit and impeach what both **Pw<sup>1</sup>** and **Pw<sup>2</sup>** testified.

Apart from **Pw<sup>1</sup>** and **Pw<sup>2</sup>**, other witnesses who resided in that house like **Pw<sup>4</sup> Mashiku Peter** and **Pw<sup>6</sup> Janet Joseph**

deposed to have identified former accused No.1 **Pendo Igobeko** and former accused No.4 **Mrisho Nyanda**. And Pw<sup>5</sup> **Hawa Hamad** deposed to have identified former accused No.1 **Pendo Igobeko** and this appellant. All this tend to show how there was no consistence in the criterion which was applied by prosecution witnesses at the **locus in quo** to identify the thugs. Mr. Matuma based on such a background to opine that the intensity of light which illuminated at the **locus in quo** when the thugs invaded there was not adequate to allow proper identification of who were the thugs.

What Mr. Matuma pointed out about poor identification of the thugs during the material time is correct because there was conflicting versions among prosecution witnesses which have been pointed out above. It follows that prosecution's case was also not proved beyond reasonable doubt against appellant to wit, his appeal is allowed. He should be released forthwith from prison unless otherwise confined there for other reasons.

**G. K. Rwakibarila**

**JUDGE**

**22.04.2009**

**Date:** 24.04.2009

**Soram:** Hon. G. K. Rwakibarila, J

**Appellant:** Present in person

**For Republic:** Ms. Mrema, SA for Republic

**B/C:** A. Kaserero